

MOTIVATING PHARMACEUTICAL POLICY  
DURING THE MULRONEY YEARS, 1984-1993:  
RATIONAL SELF INTEREST OR CAPITAL ACCUMULATION?

by

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THESIS SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF  
MASTER OF ARTS  
in the Department  
of  
Political Science

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SIMON FRASER UNIVERSITY

June 1994

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Motivating Pharmaceutical Policy During the Mulroney Years, 1984-1993: Rational

Self-Interest or Capital Accumulation?

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**Abstract:**

Over the last several decades, there has been a growing awareness of the increasing influence of multinational corporations (MNCs) in governmental agenda-setting and policy-making. Using models based on public choice and socialist theories of business-government relations, this thesis examines multinational influence in the development of policy for the Canadian pharmaceutical industry for the period 1984 - 1993, during which Progressive Conservative leader Brian Mulroney was Prime Minister of Canada. Two bills dealing with pharmaceutical patents were passed in this nine year span, the impact of which was to first, restrict and then, eliminate Canada's compulsory licensing system for pharmaceuticals. By limiting the patent protection of the mainly foreign pharmaceutical patentees, this system allowed cheaper generic versions of patented drugs to be sold on the Canadian pharmaceuticals market in competition with name brand products, thereby reducing drug costs for consumers. This legislation favoured the multinational sector at the expense of the mainly Canadian-owned generic sector of the pharmaceutical industry.

The findings of this analysis show that because the focus of each of the models was different, both produced valuable examinations of the various aspects of the Mulroney government's decision to eliminate compulsory licensing. The narrow focus of the public choice model allowed a close look at the respective resources of the two main interests seeking to persuade government to adopt their respective policy positions. However, this model did not provide an adequate explanation for some factors, such as the United States

(U.S.) government's involvement in the development of Canadian pharmaceutical policy and the extremes to which the Mulroney government's legislation favoured the mainly foreign multinational pharmaceutical companies. The socialist model, though perhaps weaker in its consideration of action at the individual level, produced a more convincing explanation of the U.S. government's involvement in the decisions taken and permits a richer understanding of the motivations of the federal government given the political context in which the pharmaceutical policy decisions took place.

As the business agenda becomes less and less appealing the more we examine it, we begin to see the importance of the Globalization argument. Without it, business and government leaders would be stuck in the tight jam of trying to popularize an agenda that offers almost nothing to non-rich Canadians. But with the invocation of Globalization, the picture changes. Business and government leaders can call for what amounts to a redesign of Canada, without ever really having to sell their positions to a skeptical public. If questions get too pointed or the austerity too bleak, they can simply resort to chanting the mantra of Globalization: we have no choice, we must compete in the global marketplace ... we have no choice, we must complete in the global marketplace ....

(Linda McQuaig. The Quick and the Dead: Brian Mulroney, Big Business, and the Seduction of Canada. Toronto: Viking, 1991; 25.)

### Acknowledgements

I owe many thanks to Dr. Lynda Erickson and, particularly, Dr. Patrick Smith for all their help and patience as I tried to pull the pieces of this project together. I also warmly thank Professor Geoffrey Weller for acting as my external committee member and for coming out of his way in order to do so.

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## CHAPTER ONE

### INTRODUCTION

This thesis concerns the role of multinational corporations (MNCs) in policy making for the pharmaceutical industry in Canada during the period 1984 to 1993. It assesses the capacity of multinational pharmaceutical companies to influence the development of legislation on pharmaceuticals in Canada during the administration of Prime Minister Brian Mulroney. This examination uses analytical frameworks taken from two bodies of theory -- public choice and socialist -- regarding business-government relations in capitalist societies in order to develop a broader understanding of the course which pharmaceutical legislation took during this period.

Over the last several decades, an increasing number of authors, most notably from the 'left', have noted the apparently growing impact that MNCs have had on the agenda-setting and policy making roles of national, and even sub-national, governments. They have also suggested this involvement of MNCs has not always appeared to be in the best interest of the majority of citizens within the territory concerned.<sup>2</sup> I consider this phenomenon with respect to two pieces

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<sup>2</sup> See, for example, Marjorie Cohen, "The Lunacy of Free Trade." 1992; Jim Benn, "The U.S. and the Global Economy." 1992; Daniel Drache, "The Systematic Search for Flexibility: National Competitiveness and New Work Relations.", 1991; Daniel Drache and Meric S. Gertler "The World Economy and the Nation-State: The New International Order." 1991; Walter Adams, "Corporate Concentration and Power.", 233-252; Stephen Gill and David Law "The Power of Capital." Chapter in Global Political Economy., 1988; Joan Edelman Spero, "The Multinational Corporation and the Issue of Management." Chapter in The Politics of International Economic Relations., 1990.

of legislation -- Bill C-22 and Bill C-91 -- which concerned pharmaceutical patents, the protection of patent exclusivity, as well as the creation, and later modification, of a new regulatory agency intended to oversee the pricing of patented pharmaceuticals.

These pieces of legislation resulted in the elimination of a mechanism -- compulsory licensing -- which had served for fifteen years to lower the prices paid by Canadian consumers for patented drugs. It also had stimulated the growth an indigenous industrial sector producing generic pharmaceutical products. Even before the legislation was passed, the proposed amendments to the compulsory licensing system for pharmaceuticals appeared likely to have a detrimental impact on both Canadian consumers and a sector of Canadian business. If, indeed, this was the case, why then did the Canadian government pass Bills C-22 and C-91? I demonstrate in this thesis that the federal government passed these bills in response to pressure from multinational corporations, particularly those from the United States. I also analyze and draw conclusions as to the circumstances which enabled the pharmaceutical multinational corporations to apply this pressure, eventually leading to the elimination of compulsory licensing of pharmaceuticals in Canada.

My decision to use Canadian pharmaceutical policy as a case study of this phenomenon of MNC involvement in national decision-making is appropriate for at least two reasons. The first reason relates to the basic structure of the pharmaceutical industry in Canada, a structure which consists of two dominant sectors, one made

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up of the multinational pharmaceutical companies none of which have Canada as their homebase, and the other made up of generic drug companies the majority of which are Canadian owned and operated. The effect of this structure is to neatly separate domestic business interests from foreign business interests, thus enabling the observer to make more solid generalizations about those interests and how they have been furthered or hindered by government policies. Moreover, given this situation, legislation which favours one sector is more likely to have a detrimental impact on the other sector.

The second reason for the appropriateness of this case study relates to the significant shift in direction of pharmaceutical policy which occurred during this period compared with the policy direction of the previous decade and a half, and the fact that this shift coincides with the change at the federal level to a government led by a party which advocated a substantially neo-conservative approach to governing.<sup>2</sup> This change of government allows for the establishment of a clear starting point for this study. Similarly, Bill C-91 was proclaimed in February of 1993, which, coincidentally, is the same month in which Brian Mulroney announced his intention to resign as prime minister and to step down as leader of the Progressive Conservative Party. This provides a tidy endpoint for the period under scrutiny.

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<sup>2</sup> In other words, the Progressive Conservatives at this time favoured such ideas as reducing the size and scope of government, scaling back the social welfare system, and relying on the market as the most efficient allocator of resources and the most reliable source of economic prosperity for the country (Johnson, McBride and Smith 1994 4).

My analysis relies on public choice and socialist theories of political economy to explain the pharmaceutical patent policies which were implemented by the Mulroney government. For this section of my thesis -- Chapter Two -- I will use an explanation of the public choice perspective on the interaction between government and business provided by Anthony Downs, W.T. Stanbury, and Peter Self.<sup>3</sup> Portions of Stanbury's (1988a 393-452) framework for analyzing the aspects of corporate power will be used extensively as a guide in the examination of the two trade associations in the Canadian pharmaceutical industry. To contrast the explanations provided by public choice theory for Canadian pharmaceutical policy during this period, I consider the assertions of socialist political economy. James O'Connor's theory of the functions of the capitalist state and variations of that theory offered by such authors as Leo Panitch and David Wolfe are prominent as representatives of socialist political economic theory.<sup>4</sup>

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<sup>3</sup> See Anthony Downs "An Economic Theory of Political Action in a Democracy." 1957, (also by Downs An Economic Theory of Democracy. 1957); W.T. Stanbury, "Corporate Power and Political Influence." 1988, and Business-Government Relations in Canada: Grappling with Leviathan. 1988; Peter Self, Government by the Market?: The Politics of Public Choice., 1993 (a critical assessment of public choice theory).

<sup>4</sup> See James O'Connor's The Fiscal Crisis of the State. 1971; Leo Panitch "The Role and Nature of the State." 1977; David Wolfe "The State and Economic Policy in Canada, 1968-75." 1977; see also Kari Levitt The Silent Surrender: The Multinational Corporation in Canada., 1970.

Public Choice theory assumes all actors, whether in the political or economic 'market', are rational and self-interested. Consequently, political actors seek to retain the support of committed voters and, in particular, to satisfy the concerns of uncommitted voters; trying to satisfy committed supporters of other parties would be, according to public choice, a waste of effort. In attempting to ascertain what policies are needed for the support of uncommitted voters, significant economic resources must be available to finance the development of political resources, such as polling information, lobbying firms, policy research, etc.. Seeing this need of political parties and actors, business actors, particularly 'big business', will offer both economic and informational resources to them in exchange for political favours (Stanbury 1988a 402). This creates a situation in which, says W.T. Stanbury,

... large stakeholders provide political parties with cash and other forms of political support in return for promises of policies that are favourable to them. The concentration of economic resources which can be brought to bear in the political arena results in grossly imperfect competition in politics and policy making. Big business effectively has a much louder voice and resources to out-compete its rivals in the political arena on average, if not in every instance (ibid. - emphasis in original).

Contrasting with public choice, socialist political economist James O'Connor, in Fiscal Crisis of the State, asserts that the capitalist state has two main functions: the 'accumulation' function and the 'legitimation' function (1973 6). The capacity of MNCs to press the government to pass this legislation derives from the accumulation function which the state must fulfill. This function

means that the state "... must try to maintain or create the conditions in which profitable capital accumulation is possible" (ibid.). In order to do this, the state 'socializes' many of the costs or expenditures which historically would have been paid by capital. For example, rather than have capital pay the cost for training employees in basic computer skills, that cost is now borne by the state. The funds which might have been paid by a business to train employees in data entry or wordprocessing can now, as a result of this socialization process, be designated as profits.

As major corporations outgrow national markets and establish operations in other countries, they can press national<sup>5</sup> governments to compete with each other to provide for big business the most profitable capital accumulation provisions. The rewards for governments which act to improve accumulation potential for big business may include increased investment and employment; the penalty for not acting may include flattened or decreased investment, or even the complete pull-out, or threat of it, of a corporation or group of corporations from the country, or region, in question.

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<sup>5</sup> As major corporations outgrow national markets they can apply pressure not only to national governments, but also to sub-national governments, as Jim Benn notes in his article "The U.S. and the Global Economy.":

Within the United States, industrial communities have already established quite a shameless history of cutting each other's throats for the smallest business investment (1992 46).



Whether the desired capital accumulation provisions have a detrimental impact on the citizens, including both individuals and indigenous business, of a particular country, and how the state manages "...to maintain or create the conditions for social harmony" (O'Connor 1973 6), which is the state's 'legitimation' function, is of little concern to big business leaders; their priority is to maintain at least and preferably increase the profit margin of the corporation. While corporations may have little concern for the state's legitimation function, the state, obviously, must be attentive to this concern. However, the accumulation function is of primary concern, and the state will, therefore, often attempt to make accumulation activities appear to be legitimation activities (ibid.).

Public choice and socialist political economy clearly characterize capitalist business-government relations quite differently: the former depicts them as essentially voluntary and resulting in mutually beneficial exchanges, while the latter depicts them as fundamental to the needs of the capitalist economy and, therefore, geared towards ensuring continued profitability of capital within the economy concerned.<sup>6</sup> These varying portrayals of business-government relations result in different explanations for the Mulroney government's decision to pass Bills C-22 and C-91.

In Chapter Three, the determination of the role of the MNCs is approached from several directions, but it is essentially an account of what happened; why things happened is addressed in Chapter Four. I begin by briefly defining several key and frequently used terms.

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<sup>6</sup> For further detail of the two theories, see Chapter Two.

This chapter also provides an overview of characteristics of the Canadian 'nation-state' which are pertinent to this topic, including Canada's federal structure and constitutional division of government powers. A look at the structure of the pharmaceutical industry is also included in this chapter. I proceed to look at the early years of Canadian pharmaceutical industry, including an examination of the first incarnation of compulsory licensing, passed in 1923, and why it did not achieve the goals set for it. I then move on to consider briefly later events which had a significant impact on the industry's development, such as the implementation of publicly-funded hospital and health insurance and the federal government's reaction to the drug industry's behaviour resulting in the commission of several government studies. All of these studies considered the issue of the pharmaceutical industry and drug costs as part of their mandate and contributed to the government's eventual decision to revisit compulsory licensing as a mechanism for dealing with rising pharmaceutical costs.

Events in the early 1980s, during which the multinational pharmaceutical industry actively lobbied for Ottawa to rescind the compulsory licensing legislation (Lexchin 1984 176-80; Campbell and Pal 1988 62-3) are also examined in Chapter Three. This lobbying was not, in itself, unusual -- the multinational drug companies had, amongst other things, lobbied the government throughout the 1970s; however, the efforts of the MNCs began, at this time, to show signs of fruition (ibid.). Consequently, it is important to outline the development of the pharmaceutical issue in this period. Finally in

this chapter, I detail the path this issue took during the Mulroney years. Besides developments clearly related to the drug industry, this chapter includes a review of issues less obviously relevant but which appear to have played a role in the development of the legislation which would have a significant impact on it. Approaching federal elections, the changing global economy, the Mulroney government's choice of the main economic strategy for Canada, and the negotiation of free trade agreements with the United States and, later, with Mexico, all number among these issues.

In Chapter Four, in order to consider the role MNCs played in the process leading to Bill C-22 and C-91, and given the outline of events provided, I then ask what it was that enabled the MNCs to press Canada's senior level of government to pass legislation which suited the interests of the MNCs but which had (and may yet still have) a significantly detrimental impact on the majority of Canadian citizens. With this question in mind, analytical frameworks based on each of the two theories being used will be used to 'filter' the events of the 1980s in the pharmaceutical industry in order to determine how each theory might explain the passage of the two bills under examination. I then consider which of these two theories provides the better explanation for pharmaceutical policy under the Mulroney government by weighing the strengths and weaknesses of each theory as applied to the case study.

This thesis is limited in its commentary to the Canadian pharmaceutical industry, its relationship with the federal government, and the impact of multinational corporations on both. I

do not pretend to argue one way or the other on the value of the patent system in general.

To summarize, this thesis is a case study of the pharmaceutical industry in Canada and the legislative changes affecting it during the nine period that the Progressive Conservatives, led by Brian Mulroney, were in office in Ottawa. The focus of the study is to determine why the Mulroney Conservatives chose to pass legislation which, while clearly in the interests of the foreign-owned, multinational pharmaceutical companies, was much less clearly in the interests of Canadian consumers of drug products, and clearly not in the interest of the predominantly Canadian-owned generic drug sector. In order to make this determination, I use analytical frameworks based on two theories -- socialist political economy and public choice -- which depict the power of business in business-government relations as stemming from different sources: in the case of socialist theory, the accumulation function, the primary function of the capitalist state, is advanced as source of business power; in the case of public choice theory, the voluntary exchange of favours between business and government which occurs because of politicians' need for financial and informational resources is advanced as the source of business power. A more detailed accounting of these two theories will now be presented in Chapter Two.

CHAPTER TWOAN OVERVIEW OF PUBLIC CHOICE AND SOCIALIST THEORIES OF  
POLITICAL ECONOMY

The following is a brief examination of socialist and public choice theories and their portrayal of what motivates business-government relations. When applied to the pharmaceutical case study, the frameworks representing these two theories provide quite different explanations for the enactment of Bills C-22 and C-91 by the Mulroney government and for the derivation of multinational influence with respect to the development of legislation. Each of the two theories will be discussed separately with a general consideration of the theory's main points. A more detailed examination will then be provided considering how each theory characterizes the relationship between business and government. It is this characterization that will be used in the analysis chapter to assess the relationship between the Canadian federal government and the multinational pharmaceutical industry.

A) Public Choice

In its most simple form, public choice theory can be described as the application of the principles of classical economics to the operation of politics as a means of understanding that operation. Providing an overview of the public choice view of society, Peter Self, in a critical assessment of the theory, explains the comparison made between the political 'market' and the economic market:

... voters can be likened to consumers;  
political parties become entrepreneurs who  
offer competing packages of services and  
taxes in exchange for votes; political

propaganda equates with commercial advertising; government agencies are public firms dependent upon receiving or drumming up adequate political support to cover their costs; and interest groups are co-operative associations of consumers or producers of public goods... the whole political system can be viewed as a gigantic market for the demand and supply of 'public goods', meaning all outputs supplied through a political instead of a market process (and including regulations and transfer payments as well as goods and services).... (1993 3).<sup>1</sup>

The above statements, while descriptive, provide little idea of the breadth of public choice theory. Such a detailed endeavour, however, is not my purpose here; rather, I will provide only a brief delineation of the major principles of public choice and then, will move to examine more closely that portion of this market-oriented conception of political events and public policy making which is relevant to the subject of my thesis: namely, the public choice explanation for the relations between business and government.<sup>2</sup>

The starting point to any consideration of public choice theory is the recognition that the individual is the basic unit of political action and that any individual is rational and self-interested and,

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<sup>1</sup> Peter Self also explains that public choice is a joining of economic and political theory which argues the "... general beneficence of markets and the many failures of politics ... [and] it claims to expose grave intrinsic defects in the political process, especially when compared to the merits of market choice" (1993 56).

<sup>2</sup> For a more comprehensive coverage of the intricacies of public choice theory, see Joe B. Stevens, The Economics of Collective Choice., 1993; Iain MacLean, Public Choice: An Introduction., 1987; D.C. Mueller, Public Choice., 1979. For more critical examinations of public choice, see Peter Self, Government By the Market?: The Politics of Public Choice., 1993; Julien Van Den Broeck, ed., Public Choice., 1987.

consequently, will act to maximize his/her 'utility' or welfare. In a democratically governed society, government activities ideally are based on the decisions of the electorate, decisions which, according to public choice, are rooted in the self-interest motive. Downs, in both his article "An Economic Theory of Political Action in a Democracy" and his book An Economic Theory of Democracy (1957), describes such an ideal government as one established through a "periodic" election process whereby at least two political parties seek control of the government. The goal of this election process is for one party (or a coalition of parties)<sup>2</sup> to obtain a majority of the votes cast by all adult citizens of the political system, who Downs assumes are all "sane" and "law-abiding" and have "one and only one vote in each election" (Downs 1957 137). Currently, political systems such as those in Canada, Western Europe, Japan, and the United States, among others, would essentially meet these criteria.

Obviously, the electorate cannot be involved in each and every decision which a government makes. As a result, the leaders of the party which achieves government status generally argue that their election success demonstrates that the public approves of the party's election 'platform,' and, therefore, the governing party has been granted the 'mandate' to make decisions on their behalf. If the goal of the rational, self-interested politician is to achieve governmental position, then he/she, along with other like-minded

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<sup>2</sup> For the sake of simplicity, I will only refer to situations of one party achieving the control of government. That there may be a situation involving a coalition being formed by parties in order to achieve government power will be assumed.

politicians forming a political party, will attempt to formulate their party platform according to what they believe will most appeal to the rational, self-interested individuals who make up the electorate. This was Downs central premise: "political parties in a democracy formulate policy strictly as a means of gaining votes" (ibid. 137). He continues: "... they formulate policies and serve interest groups in order to gain office .... In effect, it is an entrepreneur selling policies for votes instead of products for money" (ibid.).

Determining what policies the electorate desires is, however, a less than straightforward process since, as Downs explains, information in the 'political market', like information in the economic market, is imperfect, thus resulting in imperfect competition. Not only are voters without the information necessary to make a fully informed decision as to which political party will best meet his/her self-interest (Downs 1957 145-48), but political parties are also without the information necessary to determine which policies will provide them with a majority of the votes<sup>4</sup> cast on election day (ibid. 138-42).

Obtaining information is a costly exercise, and voters, as rational, self-interested individuals, will expend as few resources - - whether time, money, energy or all three -- as necessary in their efforts to determine which party shall get their vote. The reason for this is that the likelihood of an election being so close that one

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<sup>4</sup> In multi-party systems, such as Canada's, a plurality of votes, not a majority, is all that is needed.



person's vote makes the difference between one party or another party gaining control of the government is minute.<sup>5</sup> Consequently, the resources expended to obtain sufficient information about the election alternatives available would constitute a "sheer waste" (ibid. 147). 'Free' information -- that is, information which requires little or no expenditure of resources, such as newspaper articles on the parties, advertisements, opinions put forth by commentators, friends, or peers -- if available, will likely be used extensively in the voter's decision process, perhaps being supplemented with some knowledge for which resources were expended, though any such supplement would be minimal (ibid. 146).<sup>6</sup>

Given the willingness of voters to use 'free information' in their efforts to determine their party preference, it is worthwhile for a party or a particular interest to expend the resources necessary to provide data which will help voters to make their

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<sup>5</sup> As outlined by John Courtney, of the nine Canadian federal elections held between 1953 and 1974, only one -- 1963 -- saw the Liberal and Progressive Conservative parties get the same percentage of the national vote; however, the distribution of that vote was not the same, resulting in Conservatives under Diefenbaker getting 116 seats compared to the Liberals' 99 seats (1978 45-6). In other words, the fact that Canada has a multi-party, single member riding, electoral system further reduces the likelihood that a single vote will make the difference between one party or another becoming the government.

<sup>6</sup> In the four federal elections between 1979 and 1988, the proportion of total election expenses devoted to advertising by the Liberal and Conservative parties was consistently more than 50 per cent and ranged as high as 71 per cent (Conservatives in 1979). Of the three main parties, only the New Democratic Party's advertising expenses were less than 50 per cent (Elections Canada - as detailed in Stanbury 1993a 453). The value of 'free' information from the perspective of the parties seems clear.

decision. Downs called people who provide 'free' information "persuaders", and while he argued that individual persuaders were unlikely to make a significant difference to an election result (ibid. 147), he apparently believed that a number of individuals, pooling their resources and working together to convince voters to take a particular decision, were more likely to be successful in their endeavour.<sup>7</sup> Downs asserts:

Persuaders are not interested per se in helping people who are uncertain become less so; they want to produce a decision that aids their cause. Therefore, they provide only those facts which are favourable to whatever group they are supporting (ibid. 139-40).<sup>a</sup>

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<sup>7</sup> Of course, the individuals pooling their resources often run into another set of problems related to co-operative action. As Self points out, "[the] pursuit of rational self-interest often frustrates social co-operation" (1993 11). These problems are frequently demonstrated through the use of game models, and while authors refer to them by various names, McLean's designations -- Assurance games, Chicken games, and Prisoners' Dilemma games (1987 20) -- seem the most descriptive and straightforward. These co-operation problems would include the perennial issue of 'free riding' by individuals in groups and associations.

As will be evident as the details of this case study come to light, there was considerable co-operative action undertaken in the pharmaceutical issue; however, while there may have been a few minor occasions where problems of co-operative action may have played a role, none of them had any significant bearing on the outcome of events. Consequently, I will not be detailing these potential problems except to acknowledge their existence and to recognize their role in public choice theory generally. The sources noted in Footnote 2 above, all provide good coverage of the problems of co-operation.

<sup>a</sup> Stanbury (1988 140; 1993b 581-2) agrees with this position.

The impact of the persuaders' activities can be significant to the operation of government<sup>9</sup>, and, while it may not always be the case, access to considerable resources, particularly those of a monetary nature, which can be converted into other types of resources, such as information, seems likely to increase the probability that persuaders will be more successful in their persuasion efforts.<sup>10</sup> Says Downs:

Since it takes scarce resources to provide information to hesitant citizens, ... [those] who command such resources are able to wield more than proportional influence, *ceteris paribus*. The government, being rational, cannot afford to overlook this fact in designing policy (*ibid.* 140).<sup>11</sup>

Political parties, which are, of course, seeking to become or to remain the government, are also living in this world of imperfect information in which they are attempting to determine the policies most likely to appeal to the electorate at the time of the next election. Public choice theory asserts that

[if] individual preference is the criterion for public policy (the usual public choice assumption) and if ... political preference is to be accorded the same status and respect

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<sup>9</sup> This is because, though the electoral system may operate on the principle of 'one person, one vote', in fact, persuaders have more electoral clout than most through their ability to use resources "to influence more votes than they cast" (Downs 1957 140).

<sup>10</sup> The failure of the 'Yes' side in Canada's Charlottetown Accord referendum, held in 1992, provides a good example of an exception to this rule.

<sup>11</sup> See also Joe B. Stevens (1993 186-90) for a concurring explanation of this issue.

as market preference, every effort should be made to discover what the public actually want and to implement their preferences. These efforts need not be confined to the act of voting, important as that is; social surveys, public opinion polls, cost-benefit analysis and other devices for ascertaining what people want can be used (Self 1993 50 - emphasis in original).

Whether a party holds government power or not, there is no way it can seek the opinions of each and every voter in its efforts to ascertain the preferred policies of the electorate. Even if it could from a logistical perspective, such an exercise would be well beyond the financial means of the vast majority of parties. Consequently, a party will likely take the following three types of action. First, it will rely on the pronouncements of some individuals or groups of individuals who claim either to be expert in a particular field and, therefore, know the course of action needed in that field to benefit the general population, or to be representative of the wishes of a substantial segment of the population. Moreover, to substantiate their claims, they will provide information to the government which, conveniently of course, supports their position (Downs 1957 140, 148). These individuals or groups may be the very same 'persuaders' who, as noted above, are attempting to convince voters to take a particular position by providing them with 'free' information which is usually biased in nature.<sup>12</sup> Second, a party will focus its

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<sup>12</sup> In British Columbia during the early 1990s, the activities of environmental organizations, such as Greenpeace, and the various forestry companies provide a good example of how the two sides of an issue -- in this case, forest conservation -- can and will compete to convince both the government and the public of the validity of their respective positions compared to that of their opponent.

attention on a limited range of potential policy options which will appeal to voters who have not yet established a commitment to a particular party. As Hartle explains it:

Parties, leaders and candidates increase their likelihood of success (obtaining the largest number of seats) by seeking to appeal to the uncommitted voters in marginal constituencies .... At the extremes, rewarding the faithful is unnecessary and rewarding staunch opponents is futile (Hartle 1984 67 - as quoted in Stanbury 1988b 131).

However, Stanbury outlines the reason why parties must be careful not to alienate the potential marginal voters of future elections :

... unanticipated exogenous forces may cause a shift in political fortunes, and a party does not want to be seen as crassly practising the dictums of marginal-voter politics ... Yesterday's opposition supporters may be tomorrow's uncommitted voters and therefore potential supporters. Gratuitous political insults (the failure to provide any political 'goodies' for inframarginal voters) make it harder for such changes to occur (Stanbury 1988b 154n).

Third, and most relevant to the pharmaceutical case study being considered here, a party, in order to improve its ability to determine voter preferences, will accept donations of resources -- financial or otherwise -- from persuaders.<sup>13</sup> This willingness on

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<sup>13</sup> It is also worth noting that persuaders are more likely to direct their attention to the party in government, as opposed to other political parties, in their efforts to achieve their specific policy goals. The reason for this is that the governing party, obviously, already controls the levers of government power and, therefore, offers the best chance of success for the persuader in the nearer, rather than the more distant, future. While persuaders may pay some attention to different political parties, this probably will be more limited, except during election periods, and especially if at that time, there appears to be a good chance that a different political party will become the government. K.Z. Paltiel suggested that during election periods, there appears to be a general 'rule of

the part of political parties to accept such donations is due to the fact that the process of determining the electorate's preferences requires significant financial resources of which parties often do not possess enough.<sup>14</sup> Persuaders, or special interests, including 'big business' with its access to large amounts of capital, see an opportunity to step into the void and provide the financial resources needed for the political parties and leaders to identify public preferences.

Obviously, given that public choice assumes rational, self-interested actors in the political marketplace, persuaders would not make such donations unless they perceived some benefit to be gained through the action. Public choice adherents posit that these 'special interest' groups receive from the party, in return for this 'assistance', favours or promises of favours which will be of benefit to them. Downs explains that through the provision of resources, persuaders "... exchange their political help for policy favors - a transaction eminently rational for both themselves and the government" (1957 141). Coming to a similar conclusion, Bennett and Di Lorenzo describe the political process as one where "[politicians]

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thumb' of a 60/40 split used by persuader organizations in dividing their political donations between the two traditional main federal parties in Canada (1970 - as quoted in Stanbury 1989 355).

<sup>14</sup> As an indication of the cost of determining the electorate's preferences, a March 1994 poll conducted for the British Columbia government regarding the public's attitudes on forestry policies and practices in the province cost \$70,000 provides a good example. The poll's sample of 1170 persons was limited to citizens of B.C. (Baldry 10 May/94 B1). Clearly, parties commissioning regular polls must have considerable financial resources in order to afford such a costly endeavour on a regular basis.

use the machinery of government to bestow favours on special-interest groups that, in turn, provide votes and campaign contributions for the next election battle" (1985 4 - as quoted in Stanbury 1993c 130). Another aspect of this 'exchange' is that these political favours generally provide, or will provide, concentrated benefits to the interest group concerned, while much of the cost for those benefits will usually be diffused across a broader section of the population.<sup>15</sup> Says Self on this issue:

Interest groups, bureaucrats and politicians, singly or in combination, can and do manipulate the political process for personal gain at the general expense. Interest groups gain from the mismatch between the 'concentrated benefits' which they seek and the diffused costs which they impose, and from the gains to politicians or bureaucrats of a mutual exchange of favours (1993 58).

Public choice adherents do recognize that this exchange relationship between business and government is potentially problematic from the perspective of the principle of democratic government, but they argue that the efforts of business to persuade government to take (or not, as the case may be) particular decisions are quite natural given the level of government intervention in the market and the extent to which that intervention can affect the profits of business. Self explains the argument:

Many [Keynesian] economists looked to the government to correct ... [market] failures ... [however] public choice theorists have reversed this approach towards market

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<sup>15</sup> In the pharmaceutical issue, this is partly true, though much of the cost of the political favours granted were, and are, borne by one indigenous industrial sector. This will be more carefully examined in Chapter Four.

failures. Their contention is that governments have largely failed in their market interventions because of the perversions caused by special interests. Their general conclusion is that 'political failures' are in fact more serious and inevitable than 'market failures,' so that government intervention in the market ought to be confined to an inescapable minimum of general rules (Self 1993 213 - emphasis added).<sup>16</sup>

In other words, public choice advocates argue that persuaders are able to get the 'ear' of government because of the increasing power and responsibility which has both been given to and assumed by the state, particularly over post-World War II period. These increasing responsibilities have increased the government's demand for information in order that it be able to make policy in these areas. This creates a market for information which, because of their extensive and varied resources, special interests and big business, such as the foreign-owned pharmaceutical companies operating in Canada's pharmaceutical industry, can provide in exchange for 'favours' from political leaders.<sup>17</sup> Public choice supporters further assert that this situation -- where the financial resources of special interests can be exchanged for political favours -- would not exist, or would at least be significantly reduced, through "... a relaxation of bureaucratic rules, decentralising authority to micro-institutions, introducing some measure of internal competition and attending to the needs of different publics instead of offering

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<sup>16</sup> See also Stanbury (1988a 402).

<sup>17</sup> This appears to the point at which the 'political market' and the 'economic market' join.



uniform services" (Osborne and Gaebler 1992 - as paraphrased in Self 1993 63).<sup>1a</sup>

Summarizing then, it is the governing party's need for resources -- both financial and information resources -- in order to determine the preferences of the electorate, and the access of big business to those resources which creates the situation whereby special interests seeking particular political decisions can 'exchange favours' with the party in government and seeking re-election. In the case study being examined here, it is the needs of the Conservative government under Brian Mulroney and the access of

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<sup>1a</sup> The theory, according to public choice advocates, is that if the state reduced its role and expanded the operation of the economic marketplace in what has been part of the political realm, government would not need to determine the public's 'preferences' in those areas and, therefore, would be less susceptible to the pressure of special interests. Those functions returned to the economic market would be the focus of competition (providing government did not introduce too many barriers to competition) and those who provided the service or function according to preferences of the public and did so at the most reasonable cost would be the most profitable. As Resnick explains, "A minimal version of the state, freeing members of society and market actors to 'do their own thing,' would greatly enhance the practice of liberty" (Resnick 1994 27) because there would be no reason for the state to be held hostage by special interests since the state would no longer be responsible for as many functions and services

This scenario apparently assumes that all potential purchasers of former government services or products have equally sufficient resources with which to purchase them when being sold on the economic market (Self 1993 63). Obviously, this is not the case, and the potential result of this situation is well demonstrated by the healthcare system in the United States, where those who can afford it get good or even excellent healthcare, while those who cannot afford it get mediocre or possibly no healthcare. The idea of a voucher system for education - an idea which has been topical on several occasions in British Columbia's political and education circles -- is an attempt at remedying this problem of unequal resources on the part of members of the public while enforcing competitive discipline on the educational system.

the two sectors of the pharmaceutical industry to those needed resources that will be examined in Chapter Four.

Though there are numerous models based on the public choice approach which can be used to examine business-government relations, this case study will rely primarily on the analytical framework provided by W.T. Stanbury (1988a 393-452). By aggregating the main points that various authors have noted regarding the manipulation of political power by large corporations, Stanbury constructs a framework of six categories that detail the various aspects of corporate political power. The six categories include: a) "Objectives of the Exercise of Political Power by Corporations"; b) "Concerns About Corporations' Political Power"; c) "Sources/Bases of the Political Power of Large Corporations"<sup>19</sup> ; d) "Means Through Which Political Power is Exercised"; e) "Manifestations of Political Power"; f) "Limitations on Large Corporations' Political Influence" (Stanbury 1988a 397-8).

By providing this catalogue of the many factors which can contribute to the corporate possession of political power,<sup>20</sup> Stanbury has developed a standard to which various interests can be compared in order to determine the extent to which those interests may be able (or may have been able) to influence political decisions.

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<sup>19</sup> While Stanbury refer to the items within this category as "bases" or "sources" of corporate political power, I will generally refer to them as resources.

<sup>20</sup> Stanbury focuses on the exercise of political power by corporations; however, his framework is equally applicable to other interests.

In this case study, Stanbury's framework, particularly the categories dealing with corporate objectives and the sources or bases of political power, will be used as guide to compare the potential for political influence of two trade associations in the Canadian pharmaceutical industry. These two trade associations are the Pharmaceutical Manufacturers Association of Canada (PMAC), as representative of the interests of the multinational sector of the Canadian pharmaceutical industry (Lexchin 1984 33), and the Canadian Drug Manufacturers Association, as representative of the interests of the industry's generic sector (CDMA Quick Facts April/94).

Within the context of corporate objectives in the exercise of political power, Stanbury includes such aims as the ability to shape the political agenda, the creation of a 'business friendly' political environment which encourages business-oriented decisions, and the ability to influence how government decisions, whether political or administrative, are made. A sampling of the sources or bases of corporate political power as outlined by Stanbury and which will be used in this analysis includes: the size of corporate operations, particularly if they are locally or regionally concentrated; the absence or relative weakness of opposing power bases, the linkages between government and corporate elites; and the past success of corporations in efforts to influence government decisions. As will become obvious as the details of the pharmaceutical case are revealed, many of these were available to both sectors of the industry to be used as resources in influencing political decisions;

these resources were not, however, equally distributed between the sectors.

This case study of the pharmaceutical industry and public policy making in Canada will provide a basis for assessing the general principles of the public choice perspective on political economy. Prior to that, however, the second theory of business-government relations -- socialist theory -- must be outlined. This model provides an alternative approach to explaining the development and the policy outcomes of the pharmaceuticals issue in Canada.

#### B) Socialist Political Economy

According to James O'Connor's theory of the functions of the capitalist state, the state must fulfill two, often contradictory roles in the capitalist system: accumulation and legitimation. The accumulation function involves the maintenance or creation of "... conditions in which profitable capital accumulation is possible" (O'Connor 1973 6). As O'Connor explains, "... a state that ignores the necessity of assisting the process of capital accumulation risks drying up the sources of its own power, the economy's surplus production capacity and the taxes drawn from this surplus ..." (ibid.). The legitimation function, on the other hand, is the maintenance or creation of the "... conditions for social harmony" (ibid.).<sup>21</sup> The state does possess the legitimate right to use

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<sup>21</sup> Leo Panitch expands O'Connor's two functions to three by including a coercion function which O'Connor recognizes but does not consider a separate function of state.

coercion to ensure that measures intended to enhance capital accumulation are implemented with a minimal level of social disorder (Panitch 1977 8). However, as O'Connor himself says: "A capitalist state that openly uses its coercive forces to help one class accumulate capital at the expense of other classes loses its legitimacy and hence undermines the basis of its loyalty and support" (O'Connor 1973 6).<sup>22</sup> Clearly, the functions of the capitalist state can potentially be contradictory in nature; consequently, the state will often attempt to make policies which are designed to further accumulation potential look like "... something they are not, or it [will] ... try to conceal them (e.g., by making them into administrative, not political, issues)" (ibid.).<sup>23</sup>

Examples of policies intended to further capital accumulation include such measures as "... accelerated depreciation allowances, investment allowances, lower corporate tax rates, and tax incentives for research and development ..." (Wolfe 1977 253), all of which

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<sup>22</sup> It should be noted that the use of coercion by the state does not necessarily mean violence and/or the use of arms. For example, by invoking closure on debate and stacking the Senate with extra Conservative senators, the Conservative Prime Minister Brian Mulroney used the state's coercive capacity to ensure that the Goods and Services Tax (GST) legislation was passed by Parliament. This was done despite wide-ranging and vocal opposition to the legislation from the Canadian public.

<sup>23</sup> More will be said about this in Chapter Four with the discussion of the Patented Medicines Prices Review Board, a review agency created to monitor the prices of patented pharmaceutical products on the Canadian market.

have, at some time or other, been used by the Canadian state.<sup>24</sup> It is important to note, however, that while accumulation and legitimation functions may appear to be contradictory, they are not necessarily so: "A taxation policy aimed at income redistribution for the purposes of legitimation may be contrary to short-term accumulation, but necessary to maintaining accumulation in the long run ..." (Panitch 1977 8). David Wolfe elaborates:

The adoption ... of complex social welfare programs [that is, legitimation policies] involving income transfers to low-income earners and the unemployed has ... contributed significantly to maintaining high levels of effective demand throughout the post-war period and thus to the general level of economic buoyancy. The stabilizing effects of income transfer programs are even greater when employment begins to fall because of the automatic rise in spending on programs such as unemployment insurance (1977 253).

Because they are intended to maintain social harmony, many legitimation measures will also classify as a capital accumulation measures; social disharmony is not conducive to capital accumulation, as indicated by the 1994 tensions in Mexico and the resulting investor fears that investments in Mexico may not be entirely secure.

Essentially, what O'Connor's model means is that, while the government -- the state, more generally -- of a capitalist society prefers to be depicted in the classical liberal-democratic fashion as

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<sup>24</sup> When I refer to the Canadian state, I mean the municipal, provincial and federal levels of government. For a discussion of what the 'state' encompasses and what its functions are see, for example, Leo Panitch, "The Role and Nature of the State." Chapter in The Canadian State: Political Economy and Political Power., 1977; Philip Resnick, "Functions of the Modern State." Chapter in The Masks of Proteus: Canadian Reflections on the State., 1990.

the arbiter of society's competing demands, it is, in fact, actively seeking to provide for the capitalist class the means for increasing its capital. Simultaneous to this activity, the state is seeking to maintain 'good' relations between the classes in society through various measures which may or may not appear to contradict the interests of capital.<sup>25</sup>

O'Connor goes on to outline two subgroups of private capital: the 'competitive sector' and the 'monopoly sector'. The former encompasses small-scale private businesses which generally have "local or regional" markets and depend on "unstable and irregular product ... and labor markets" (O'Connor 1973 13-4). The latter usually involves large scale production with "... markets [which] are normally national or international in scope" and where "... the growth of production depends less on growth of employment than on increases in physical capital per worker and technical progress" (ibid. 15). O'Connor's third economic sector is the 'state sector' which consists of such goods and services as "... mail service, education, public health, welfare ... and military service" (ibid. 17) and production through contracts with the state, such as "... military equipment and supplies, capital construction, and highway construction" (ibid.).

If the state is to be successful in its efforts to control costs and ensure that social expenditures do not exceed revenues by

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<sup>25</sup> For an interesting examination of the interconnections between the Canadian business and political elite, see Wallace Clement, "The Corporate Elite, the Capitalist Elite, and the Canadian State." in The Canadian State: Political Economy and Political Power. Leo Panitch, ed., 1977.

too much,<sup>26</sup> the only practical alternative for the state, O'Connor asserts,

...[is] to encourage the productivity in the monopoly sector (to restrain costs and prices and increase production and profits) and in the state sector (to ameliorate the fiscal crisis). Raising productivity in the competitive industries [i.e. non-monopoly, non-state sector] is impractical because of the large number of firms, the small scale of production, and the relative absence of integration. Direct intervention by the state in the monopoly sector ... is impractical except in wartime... (ibid. 51).

He continues:

Our main point here is that 'increased productivity' means less increasing efficiency in current state activities than it does adjusting state budgetary priorities to favor the monopoly sector. In turn, this requires centralized administrative control and budgetary planning (ibid. 53).

If the state is acting to favour the monopoly sector through its budget decisions, the monopoly sector is going to prefer measures that increase the sector participants' potential for making a profit. What will then be done with that profit -- reinvested, paid out in dividends, for example -- is the decision of the private capital owners. Says O'Connor: "... tax policy is largely designed to expand private profits and private economic activity, which means that the

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<sup>26</sup> When social expenditures are greatly in excess of revenues, a development which O'Connor argues is inevitable in the capitalist state, the situation is referred to by O'Connor as a 'fiscal crisis'. For further detail of circumstances of such an event see James O'Connor The Fiscal Crisis of the State., 1973. For an examination of this issue in the Canadian context, see Stephen McBride and John Shields, Dismantling a Nation: Canada and the New World Order., 1993.



state must not impair capital's incentives to save and invest" (O'Connor 1973 206). Tax policy, however, is not the only means through which the state can favour capital; most state decisions can be used to serve the goal of profit enhancement. Moreover, because the state relies on monopoly capital for providing economic prosperity to the society and, thereby, allowing the state to avoid the 'fiscal crisis', it can make greater and greater demands on the state that it act to increase private profitability. Again referring to O'Connor:

... state expenditures have become increasingly integral to the process of monopoly capitalist accumulation. In the long run, the state must encourage private accumulation more and more in order to generate the economic growth required to raise tax revenues that are needed to strengthen an economic system whose first and overriding purpose is profit making and accumulation. As the 'growth dividend' becomes increasingly elusive, state and private economic activity must be ever more closely meshed (ibid. 233).

The 'growth dividend' becomes increasingly "elusive" because of the tendency for productivity to fall. Susan Strange argues that, while technological advance has played a crucial role in the ability of firms to increase productivity, it also plays a part in the current problem for firms which are trying to maintain profit levels through adoption of technological improvements. She asserts that

... the key phenomenon ... [is] the accelerating rate of technological change. The change is the the (sic) speeding-up of the process by which new products replace old ones -- the word processor for the manual typewriter, the jet engine for the propeller ... and equally, by which new processes [and] new systems of information gathering, storage

and dissemination replace and make obsolete the old ones ... The self-evident result is that resource-based, manufacturing and service enterprises have all discovered that this accelerating rate of change does not give them sufficient time to recoup in profits *derived solely from local, national markets* the costs of developing and/or installing new products or new processes (1991 247 - emphasis in original).

Daniel Drache and Meric Gertler agree with Strange's appraisal:

... the nation-state can no longer satisfy the accumulation needs of the transnational and corporate players, so markets need to be enlarged by integrating national markets into larger trading areas (1991 xl).

Obviously, if a firm is unable to recoup its expenses within national market boundaries, the answer is for it to seek other markets outside those boundaries;<sup>27</sup> however, few firms have the capacity to raise the investment necessary to finance such an exercise. The result is that within a capitalist national economy, national firms are forced to compete with international firms. Wolfe describes the difficulty that increasing international competition presents for indigenous businesses whereby in order to compete with foreign rivals, they are forced to manage with a smaller and smaller profit margins as costs increase. Because of increasingly small profit margins, less and less investment is attracted to indigenous business (Wolfe 1977 257), and the national economy becomes evermore dependent on the operations of international business, or the

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<sup>27</sup> In the context of this thesis, the transnational corporations are the predominantly U.S. based name-brand pharmaceutical companies, and the market into which they have expanded is the Canadian market.

'monopoly sector' in O'Connor's terminology.<sup>28</sup> The situation clearly has the potential for becoming a vicious circle. Drache and Gertler assert: "The deeper reality of market-driven change is that the continuing drive for maximizing accumulation, whether for the few or in the name of national development, leads step by step to a crippling social dependency for the many" (1991 xv). Increasing dependence on the operations of monopoly capital for national economic growth and prosperity in turn increases the vulnerability of the state to pressure from monopoly capital to improve further the opportunities for capital accumulation.

This growing dependency on the operations of international capital within a national economy has a two-fold impact. First, it forces the states of these national entities to compete with each other to provide for big business the most favourable capital accumulation provisions. Magnus Blomstrom and Robert Lipsey explain that this forced competition between states is made possible by the flexibility of multinational firms and their ability to pull their operations out of a country<sup>29</sup> if "... a country's policies impose

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<sup>28</sup> The Canadian pharmaceutical industry, made up as it is with the majority of companies operating in the industry being foreign multinationals competing against the much smaller and mainly Canadian-owned generic companies, conforms to this description. See Chapters Three and Four for further detail on this issue.

<sup>29</sup> In countries such as Canada, Australia, and others with significantly differentiated regions, a multinational company may be able to extract the desired policies from the state by threatening to pull, or otherwise alter, their operations from a region.

too heavy costs on them" (Blomstrom and Lipsey 1993 131). From this, Blomstrom and Lipsey draw the following conclusion:

The more flexible multinationals are, the less free governments are to impose unfavourable conditions on them, either their own or foreign firms, and the more likely it is that governments will compete for the establishment of production facilities by multinationals (ibid. 141).<sup>30</sup>

Second, the growing dependency of states on multinational operations, as the above quote suggests, limits the states' sovereignty in setting public policy. Discussing the situation in Canada, which is well-known for having an economy dominated by foreign multinational offices, or a 'branch-plant economy,' Kari Levitt maintains that

[sovereignty] is not compatible with branch-plant status; the greater the degree of foreign ownership and control of Canadian industry, the narrower the freedom of choice in economic as well as political matters (1970 9).<sup>31</sup>

As noted in Chapter One, governments which act to enhance the accumulation potential of their economies may be rewarded by the multinationals with increased investment and employment, thus attaining greater resources for state expenditures. States not

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<sup>30</sup> As Chapters Three and Four will demonstrate, the increasing flexibility of multinationals has certainly been an important aspect of the debate regarding the Canadian pharmaceutical industry.

<sup>31</sup> With the Canada-U.S. and North American free trade agreements now in place, the issue of Canadian sovereignty continues to be a subject of considerable concern. For a more detailed consideration of this issue, see Stephen McBride and John Shields, Dismantling a Nation: Canada and a New World Order., 1993; Daniel Drache and Meric Gertler, eds., The Era of Global Competition: State Policy and Market Power., 1991; Jim Sinclair, ed., Crossing the Line: Canada and Free Trade with Mexico. 1992.

providing an economic environment harmonious with successful and continued capital accumulation will likely find multinationals penalizing them through flattened investment, de-investment, lay-offs, and even, potentially, a complete pull-out of international businesses. Moreover, as Robert Cox explains, this failure on the part of governments can have an impact on the overall credit-worthiness of a state: "Reluctance to follow a policy of openness to global economic movements makes foreign or domestic borrowing by the state difficult" (1991 347).

Given the significance of the potential repercussions to the economy, there is good reason for the state to respond positively to multinational pressure for improving opportunities for capital accumulation. In the case of a country which itself is 'home' to multinational companies, the economic benefits which such opportunities afford the companies will also benefit the home economy as profits are repatriated. That such benefits are to be derived is obvious judging by the support given the multinationals by their home states. As will be shown in the following chapters, the operation of the pharmaceutical industry in Canada offers a good example of the extent to which the home state -- in this case, the United States -- will act to support the interests of its multinational companies' foreign operations. Regarding this issue, Wolfe suggests that

[as] the international rivalry between American, European, and Japanese multinational firms increases, the state in the respective parent countries is likely to intervene more vigorously on behalf of its corporations in an attempt to manipulate this modern form of international economic rivalry for the maximum advantage of the domestic

economy. Thus the success of the multinational firms in capturing new markets and sources of supply, and in retaining existing ones, will depend increasingly on the international mobilization of their parent states on their behalf (1977 258).

For those countries whose parent states are not successful in this exercise or which do not possess many multinational companies, Wolfe also has a prediction about their likely future:

... for those nation-states who fail in this new form of international rivalry (there) is an increasing degree of domestic conflict over the division of the national income, as their leading firms prove less able to compete internationally and the economy suffers the inevitable consequence of a profit squeeze. It should also be evident that those nation-states with few domestically based multinational firms are placed at a serious competitive disadvantage in this new form of international competition and thus tend to be placed in a more dependent position (ibid.).

Such is the situation for Canada, and such is the case in Canada's pharmaceutical industry.

To summarize socialist theory on capitalist political economy then, the state is attributed two main functions: capital accumulation and legitimation. While both functions are important, the former, according to this perspective, is the fundamental purpose of the capitalist state. Legitimation activities can, in fact, be accumulation measures disguised to appear as measures intended to protect the general population from the excesses of the capitalist class. Technology advances have forced those companies that can afford it to expand their markets beyond national boundaries in order to maintain their profitability. However, this forces smaller,

national or local companies to compete with foreign multinationals entering their markets.

Unable to compete easily, these smaller companies find their profit margins shrinking, along with their prospects for investment dollars, while multinational operations assume greater and greater proportions of the national income. The result is that the country or society becomes increasingly dependent on multinational operations for the functioning of its economy and, therefore, becomes increasingly vulnerable to pressure from those multinationals for economic policies which will enhance capital accumulation. Those countries which are themselves parent states to numerous and strong multinational firms can expect the benefits of capital accumulation successes in other countries to benefit their economy as profits are repatriated to the home state; moreover, those states will seek to pressure the foreign governments of countries in which their multinationals operate in order to improve the levels of profits being repatriated. Those countries which do not possess strong multinationals or are not successful in their efforts to augment repatriated profits are more likely to be in a dependent position relative to those countries which do have strong multinationals or are successful in their augmentation efforts. In this dependent position, these countries are more likely to be forced to accommodate the wishes of foreign capital with little regard given to the preferences or interests of the general population.

To conclude, public choice theory characterizes the relationship between business and government as a 'political market'

in which business and government make mutually beneficial exchanges of resources. Socialist theory, on the other hand, depicts the same relationship as the result of the fundamental purpose of the capitalist state -- namely, capital accumulation. In Chapter Four, analytical frameworks based on these two theories are used to 'filter' the details of this case study on the Canadian pharmaceutical industry (provided in Chapter Three) in order to better understand why the Mulroney federal government chose to alter the legislation governing pharmaceutical patent protection in Canada.



### CHAPTER THREE

#### BUSINESS-GOVERNMENT RELATIONS IN THE PHARMACEUTICAL INDUSTRY, 1923 - 1993

This chapter provides the general background on the pharmaceutical industry in Canada and includes the definition of some important and frequently used terms in this case study. Also provided is a basic outline of the structure of the Canadian pharmaceutical industry. Following this, attention is focused on the events leading up to the period under examination -- 1984 to 1993. The examination of the nine year period ending in 1993 includes a description of the events that occurred in the Canadian pharmaceutical industry as well as those that affected the industry; particular attention is paid to the development and passage into law of Bills C-22 and C-91 which altered the patent protection accorded pharmaceutical patents. The provisions of the two bills are briefly outlined.

#### A) Definitions and the Structure of the Canadian Pharmaceutical Industry

According to Webster's Encyclopedic Unabridged Dictionary, a patent is a "government grant to an inventor, [his/her] heirs, or assigns, for a stated period of time conferring the exclusive right to make, use, license, or vend an invention, process, etc.."

Economist magazine expands on this definition, saying that this exclusivity is on "the very idea of a particular product or process"

and that this is the most powerful form of intellectual property right (22 Aug/92 17).<sup>1</sup> \* 2

A voluntary license is an agreement between the patent-holder and another party, the licensee, that permits the licensee to manufacture, distribute, or otherwise "exploit" (Consumer and Corporate Affairs 1991 64) the patented product for which the patentee holds the rights. The agreement usually includes an agreement by the licensee to pay a royalty to the patentee based on the sales of the licensed product. Such licensing agreements may also be established on patented pharmaceutical products. In contrast, a compulsory license is a mechanism granted by the government without authorization from the patentee and which ends the monopoly of the patent-holder on the product for which he/she has the patent. In the pharmaceutical industry, this means that the drug company holding the patent to a particular drug cannot prevent another company from developing a copy of the original product and marketing it in competition with that product. In Canada, the

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<sup>1</sup> Other forms of intellectual property rights include trademarks, copyrights, and registered industrial designs.

<sup>2</sup> Interestingly, while public choice supporters usually oppose government intervention in the marketplace, the patent is one form of government intervention which they support. The usual justification for patent -- or more generally, intellectual property -- protection is that without the period of exclusive right to produce, sell, license, etc., there would be no motivation to innovate, whether it be innovative gasolines or pharmaceuticals. However, as Campbell and Pal point out, if the period of exclusivity granted by a patent is too long, the motivation to innovate is similarly diminished (1989 56) because the potential innovator could continue to make monopoly profits from innovations of the past and there would, therefore, be no motivation to put resources into further innovation.

company granted the compulsory license has always had to pay the patent-holding company royalties -- generally set at a rate of four per cent (Eastman Commission 1985a 334) -- based on the sale of the generic product.

Another point which should be kept in mind as the details of this case study are revealed is the federal nature of Canada's governmental structure. The provincial governments have constitutional responsibility for social policy, such as healthcare (Constitution Act 1867 Sect.92.16), and the national government has constitutional responsibility for the regulation of trade and commerce (ibid. Sect.91.2), and for patents (ibid. Sect.91.22). The national government also has primacy in international treaties (ibid. Sect.9 and Sect. 132).<sup>2</sup>

Within the Canadian pharmaceutical industry, there are three competing sectors. As outlined in the report produced by the Special Commons Committee on Drug Costs and Prices, the first category consists of "... the large manufacturing drug houses which include the well-established subsidiaries of foreign parent corporations" (Special Committee 1967 9). The Pharmaceutical Manufacturers Association of Canada (PMAC) represents most of these firms which are

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<sup>2</sup> There is disagreement as to whether the federal government actually has exclusive authority in the area of international treaties; however, given the national government's exclusive authority with regard to trade and commerce, treaties related to this authority would have to be complied with by the provinces. For a brief discussion of the controversy over which level of government does or does not possess authority to enter into international agreements, see R.J. Jackson, D. Jackson and N. Baxter-Moore, Politics in Canada: Culture, Institutions, Behaviour and Public Policy., 1986.

generally referred to as the 'name-brand manufacturers'.<sup>4</sup> As the holders of virtually all pharmaceutical patents in Canada, the companies in this category tend to consider themselves the drug 'innovators' and consider the second category of pharmaceutical companies as the drug 'copiers'.<sup>5</sup> The second sector in the Canadian pharmaceutical industry consists of the 'generic manufacturers,' the majority of which are Canadian-owned. The Canadian Drug Manufacturers Association (CDMA) represents these interests.<sup>6</sup> While these companies carried out little research and development (R&D) of their own in the mid-1960s and the 1970s, they had, by the late 1980's, increased their proportion of R&D considerably (CDMA Impact of Bill C-91 Jan/94 10). PMAC and CDMA

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<sup>4</sup> There are currently 63 members of PMAC, of which 50 are foreign multinationals. Of the multinationals, 29 (58%) are U.S. owned. Of the 13 of 63 companies which are not foreign, at least 6 are biotechnology companies. Of the remaining 7 (of 13) companies, only 4 were members of PMAC in 1989 when the non-biotechnology member companies of the association numbered 67 (PMAC Membership Parent Countries March/94; PMAC Macleans ad supplement 11 Dec/89 36).

<sup>5</sup> There are also some less flattering names for the second category, such as 'pirates' and 'scavengers'.

<sup>6</sup> The CDMA currently represents 17 members all of which are Canadian owned; Canadian ownership is a requirement of the association for membership (CDMA private conversation 3 May/93). CDMA's membership has fallen by two since 1993 (Directory of Canadian Associations, 1993-94). There are also two large American generic companies which operate in the Canadian market.

hold very much opposing views on "certain aspects of drug manufacturing and pricing of drugs" (Special Committee 1967 9).<sup>7</sup>

The third category was defined by the Special Committee as the 'independents' and is made up of companies which are either not permitted to belong to one or other of the above-noted associations or choose not to belong. These companies may sell pharmaceuticals as either generic or name-brand products or both (ibid. 9-10). Joel Lexchin, while agreeing that there are three types of companies in the Canadian pharmaceutical industry and describing the first two categories similarly to the Special Committee classification, describes his third category differently; Lexchin's third category is consists of biotechnology companies, such as the former Crown corporation Connaught Laboratories (1984 33).<sup>a</sup>

Another characteristic of the Canadian pharmaceutical industry is its regional concentration in Central Canada, particularly, the

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<sup>7</sup> A division within an industry such as that in Canadian pharmaceutical industry, according to socialist political economy, will result in a 'zero sum' game in which the foreign sector will inevitably come out the victor over the indigenous sector of the industry. The theoretical circumstances of this situation were briefly covered in the previous chapter, and the specifics of the Canadian case study will be given further consideration in Chapter Four.

<sup>a</sup> Neither independents nor biotechnology companies will be the focus of attention in this examination of the pharmaceutical industry. The reason for this exclusion in the case of the independents is that it is difficult to ascertain both their numbers and their activities. In the case of the biotechnology companies, they are governed by different regulations, which are still in the process of being formulated as Canadians deal with the ethical questions which biotechnology presents. Moreover, though their numbers are increasing gradually, they are still relatively few in number.

Montreal area of Quebec. According the Restrictive Trade Practices Commission (RTPC) on the Manufacture, Sale and Distribution of Drugs, which reported in 1963,

[the] pharmaceutical manufacturing industry is located largely in the Central Provinces. In 1960, 177 establishments, or 89.4 per cent of the Canadian total were located in Ontario and Quebec and 7830 employees or 97.9 per cent of the Canadian total were employed by these establishments (RTPC 1963 40).

Both public choice and socialist political economy note regional concentration of industry as a contributing factor to the power of capital in business-government relations. The impact of this concentration will be given more attention in the background section of this chapter and in the following chapter.

B) Background on the Patent Provisions for Canadian Pharmaceuticals, 1923- 1983

Compulsory licensing of pharmaceuticals, until recently, had been allowed in Canada since 1923, when it was introduced by the federal government in an attempt to encourage competition in the drugs market and, thereby, lower prices for the consumer. This legislation was not successful in achieving the goal set for it. In fact, between 1923 and 1949, only one application for a compulsory license was made, and between 1949 and 1961, only 14 applications were made, five of which were granted (RTPC 1963 110-11). A major reason for this lack of success was that the legislation provided for the granting of a license only if the fine chemical ingredients for the generic product were manufactured in Canada (Special Committee 1967 41). Because of Canada's 'branch plant' pharmaceutical

industry, this stipulation virtually eliminated the possibility of a generic market for patented pharmaceuticals (Lexchin 1992 2).

Furthermore, on those occasions when an application was made, the Director of Investigation and Research, D.H.W. Henry, in his report to the RTPC (1963), emphasized that there was

... a well established policy among large companies to delay applications as long as they could, to the point where it was hardly worth the trouble and barely within the capabilities of most existing small manufacturers to successfully undertake an application (Lexchin 1984 167).

Henry also asserted: "The provisions of the Patent Act relating to compulsory licensing appear to have proved ineffectual ... and the clear intent of the Act has been frustrated."<sup>9</sup>

Myron Gordon and David Fowler argue that the relationship between the Canadian federal government and the pharmaceutical industry, up to the early 1980s anyway, "... [had] not been a smooth one, particularly for the dominant foreign-owned sector" (1981 37). Beginning in 1958, the industry "... was under scrutiny or investigation" for almost ten years (ibid.). During this period, the federal government launched four separate investigations resulting in the release of four reports which dealt, in whole or in part, with the issue of pharmaceutical products in Canada. These investigations

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<sup>9</sup> D.H.W. Henry. "Material Collected for Submission to the Restrictive Trade Practices Commission in the Course of an Inquiry under Section 42 of the Combines Investigation Act Relating to The Manufacture, Distribution and Sale of Drugs." 1961, in Restrictive Trade Practices Commission Report Concerning the Manufacture, Distribution and Sale of Drugs. Ottawa, 1963; Appendix Q, p.257.

included the Royal Commission on Patents, Copyright and Industrial Designs (the Ilsley Commission), which reported its findings in 1960; the Restrictive Trade Practices Commission (RTPC) Concerning the Manufacture, Distribution and Sale of Drugs, which made its report in 1963; the Royal Commission on Health Services (the Hall Commission), which presented its report in 1964; and, the Special Committee of the House of Commons on Drug Costs and Prices (the Harley Committee),<sup>10</sup> which reported in 1967.

All of the reports commented on the high prices of drugs -- "among the highest in the world" -- in Canada (Special Committee 1967 15). In the words of the Special Committee's (1967) Chairman, Harry Harley, the reports

... [came] to the inescapable conclusion that drug prices in Canada are in fact high and that every fair and reasonable step should be taken to reduce these prices ... and in order to discount any claim that these statements are exaggerated, it is well to bear in mind the comment made by ... [D.H.W. Henry] that if drug prices were not too high, "they were higher than need be" (ibid.).

The Special Committee (1967) made several findings, many of which confirmed the conclusions of the three earlier studies. One of those findings was that "... the profits of the pharmaceutical companies in Canada [were] about twice as high as the level of profits of the manufacturing companies generally..." (ibid. 12). The fact that the Canadian pharmaceutical industry was -- and is -- dominated by

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<sup>10</sup> Though government documents tend to refer to this as the Harley Committee, as I have noted, I will refer to it in the text as the Special Committee.



foreign multinational companies was another conclusion which the Special Committee explained in no uncertain terms:

The Committee feels it should point out ... the extent of foreign control over the Canadian drug industry. At the time of the Report of the Hall Commission was written<sup>11</sup> the thirteen largest firms in the drug field in Canada, exclusive of Connaught Medical Research Laboratories, were all branches or subsidiaries in Canada of foreign firms with the exception of one Canadian company. It was reported that all these thirteen companies had annual sales in excess of \$4 million each and were the only drug firms in Canada having sales of that magnitude. Since that report was written the last large Canadian firm was purchased by an American corporation (ibid. 9).<sup>12</sup>

All of the studies made recommendations as to the best way of reducing drug costs for Canadians. For example, the Ilsley Commission's (1960) primary recommendation was that Section 41 of the Patent Act be altered so that the Commissioner of Patents would grant a compulsory license "... unless it appears that there are good reasons for refusing the application" (Special Committee 1967 65). The RTPC (1963) argued that

... close control exercised by patents has made it possible to maintain prices of

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<sup>11</sup> I have used numerous quotes from several government documents through the course of this thesis; however, regardless of the government document used, there is often a lack of punctuation. Any absence of punctuation in the quotations used is as it was in the original.

<sup>12</sup> Following the Mulroney government's decision to privatize Connaught Laboratories in late 1989, it too was taken over by a foreign corporation, this time the French government-controlled operation Institut Merieux SA (Walmsley 25 Dec/89 45).

certain drugs at levels higher than would have obtained (sic) otherwise and that such patent control has produced no benefits to the public of Canada which would outweigh the disadvantages of the monopoly, the [RTPC] recommends that patents with respect to drugs be abolished. In the opinion of the [RTPC] this is the only effective remedy to reduce the price of drugs in Canada (RTPC 1963 526).

One Hall Commission (1964) recommendation was to change the tax laws so as to prohibit the deduction of a major portion of drug companies' promotion and marketing expenses; the expectation here was that if the drug companies were not permitted to claim such a large proportion of their promotion and marketing expenses, they would not spend as much and, therefore, the cost of their products could be expected to fall (Special Committee 1967 21-2).<sup>13</sup>

The Special Committee (1967) considered numerous proposals for reducing drug costs, but the Committee concluded that the cornerstone of their recommendations had to incorporate the need to increase competition in the pharmaceutical industry -- but only increased price competition was desirable:

... it becomes immediately obvious that the introduction of increased and open competition at all levels of the drug industry is the obvious essential element in reducing the cost of drugs to the consumer ... It is price competition, not product competition, that will lower prices. Product competition breeds increased expenditures at

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<sup>13</sup> While this period is outside the parameters of the analysis portion of this thesis, socialist theory on the functions of the state would explain this as an example of the state socializing the cost of doing business. It is worth noting that the provision to deduct promotion and marketing expenses still exists in the Income Tax Act.

the manufacturer's level. Price competition at all levels promotes lower costs through increased efficiency and cuts through extravagant promotional activity (ibid. 46-7 - emphasis in original).

Writing about pharmaceutical industry's operation since 1923 and the impact of the compulsory licensing system, Dr. Harley noted:

Were drug patents to be absolute and unconditional for the normal seventeen year term ... monopoly domination of the Canadian drug market would rest almost entirely in the hands of foreign corporations through their subsidiaries. But monopoly domination of the drug industry, through legislation, has not been permitted in Canada since 1923 ... The erosion of the absolute monopoly was introduced into patent legislation ... [through] compulsory licensing ... (Special Committee 1967 38).

Among the four recommendations made by the Special Committee, two particularly stand out as being relevant to the issue under examination.<sup>14</sup> First, it was suggested that the compulsory licensing system in Canada be expanded to include both fine chemicals and ready-made drug products manufactured outside of Canada, both classes of drug product which up to that point had been excluded from the system (ibid. 45). Second, because the patentee stood to benefit

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<sup>14</sup> The Special Committee's other two recommendations included: first, the suggestion that as an added safety precaution the Commissioner of Patents should issue compulsory licenses to generic companies only when he had been notified that the license applicant had "... satisfied the [Food and Drug] Directorate that [the applicant has] met the regulations under the Food and Drugs Act" (Special Committee 1967 41); second, in cases where the applicant was importing fine chemicals or to manufacture a generic product or importing the generic product ready-made, Food and Drug officials would go outside of Canada to inspect the manufacturing facilities, with the expenses being paid for by the licensee. This was an effort to ensure that the concerns of the first recommendation were addressed (ibid. 42).

considerably by delaying -- through appeals, for example -- the granting of the applicant's license, it was recommended that the licensee be permitted manufacture the licensed drug until, and unless, an appeal was won by the patentee. This, the Committee argued, would save Canadians a great deal in drug expenditures (ibid. 41-2). Given the fact that the Hospital Insurance and Diagnostic Services Act (HIDSA), the Canada Assistance Plan (CAP), and the Medical Care Act (Medicare) had all been passed by the time the Special Committee (1967) reported its findings, it would not be surprising if the shared-cost, open-ended nature of the programs was taken into account when the Committee formulated its recommendations. The following statement made in the Special Committee's report seems to support that possibility:

... [The] committee has been fully conscious throughout the proceedings of the importance of its task, not only because its recommendations, if carried out, might benefit the consumer of drugs, but eventually benefit Canadian taxpayers (Special Committee 1967 7). <sup>15</sup>

Referring more generally to the matter of compulsory licensing, the Special Committee made itself very clear:

[The] Committee believes that in no circumstances should the general policy of permitting compulsory licensing applications

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<sup>15</sup> For more information on the various health insurance programs in Canada and how they were made law, see, for example, Geoffrey Weller and Pranlal Manga, "The Development of Health Policy in Canada." in The Politics of Canadian Public Policy. Michael Atkinson and Marsha A. Chandler, eds., 1983; Malcolm Taylor; Rita Lindenfield; Sylvia Gelber; Peter Aucoin in Perspectives on Canadian Health and Social Services: History and Emerging Trends. Carl A. Meilicke and Janet L. Storch, eds., 1980.

for patents relating to foods and medicines  
be eliminated (ibid. 39 - emphasis added).

As these various reports were released, PMAC members began to demonstrate concern about the decisions the Liberal government of Canada might take with regard to pharmaceuticals. Their reaction was to set about rallying support for the cause of patent protection, and, as Joel Lexchin explains, PMAC, having moved its head office to Ottawa,<sup>16</sup> began a lobbying campaign which focused on providing information to the opposition Progressive Conservatives (1984 168). The flow of information focused particularly on three Conservative members of the Special Committee (1967), Dr. L. Brand, Dr. P.B. Rynard, and Mr. M. Forrestal, and "[at] least one representative of PMAC was present at all meetings of the [Harley Committee] to relay further questions and facts to these men" (ibid.).

Another part of the PMAC campaign was its efforts to rally the support of several prestigious associations, such as the Canadian Medical Association, the Canadian Manufacturers Association, the Chamber of Commerce, the Quebec College of Physicians and Surgeons, and the Association of Deans of Pharmacy of Canada. Further, PMAC sought to enlist the support of the heads of the top one hundred

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<sup>16</sup> PMAC was originally located in Toronto. Lexchin explains the two contrasting reasons provided to justify the move:

According to the then-general (sic) manager [of PMAC] S.N. Condor, the relocation was made so that headquarters would be readily accessible to the full membership of [PMAC]. A more honest reason for the move was given by Condor's successor, Guy Beauchemin, who said, "The [PMAC] was being designed to pressure" (Lexchin 1984 35).

companies in Canada, encouraging them to send letters to several Liberal ministers and the Prime Minister (ibid.). R.W Lang argues that

... PMAC's main concern was to stop the Canadian government from setting any precedent on patents and compulsory licenses that would have been an example for other countries, particularly those with large domestic markets for pharmaceuticals (Lang 1974 59 - as quoted in Lexchin 1984 168).

The forces opposing the PMAC position at this time appear to have been few in number. At the time, the CDMA was a small, recently formed organization representing about 15 per cent of Canada's pharmaceutical industry. As a consequence of its recent formation, the CDMA did not participate in any of the commissions or committees occurring before the Special Commons Committee (1967) (Special Committee 1967 9). Compared to that of PMAC, the CDMA's deputation appearing before the Special Committee was minimal to say the least. Two individuals appeared for CDMA, compared with ten that appeared for PMAC, not to mention the average of four representatives for each of seven PMAC member companies that also made individual presentations to the Committee (Appendix 'A' - Special Committee 1967 56-9). Of the six associations other than PMAC and the CDMA which made presentations to the Special Committee, only one -- the Consumers' Association of Canada -- sided with the CDMA in its position; the remainder supported the PMAC position on the issue (ibid.).<sup>17</sup>

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<sup>17</sup> It is worthwhile to note that excluding PMAC, the CDMA, and the deputations representing individual PMAC companies, a preponderance of representatives of various and numerous federal

Despite the fact that only a few forces lined up in opposition to PMAC, it seems that the federal government was its most significant opposition. The terms of reference for the Special Committee (1967) as to the job expected of the Committee member were: "... to consider and recommend, as it may deem expedient, respecting a comprehensive and effective program to reduce the price of drugs ..." (ibid. 5). This is a clear statement that the committee was to determine ways of reducing drug costs, not whether drug prices needed to be reduced; that had already been determined.

It was in this atmosphere, and despite the aggressive lobbying campaign by PMAC, that the Liberal government of Canada introduced Bill C-190, the name of which was later changed to Bill C-102. Passed by Parliament on March 28, 1969, the bill expanded the compulsory licensing provisions of the Patent Act permitting the sale of imported generic versions of drugs and those manufactured with imported fine chemicals. The intent of this legislation was exactly the same as that in 1923 -- to increase competition and, thereby, reduce drug prices. This time, unlike the original compulsory licensing provisions, the goal set for the legislation was achieved.

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government departments and agencies is discernable. Besides the ten individuals who appeared for the Food and Drug Directorate (part of the Department of Health and Welfare) alone, there were also deputations for the Department of the Registrar General, Veterans' Affairs, National Health and Welfare, National Defense, Industry, Defense Production, and the Patent and Trademark Institute of Canada. The Assistant Deputy Minister for Customs and the Minister of National Revenue also appeared, as did several representatives for the government of Alberta (Special Committee 1967 56-9). Compared with other sectors of society, the federal government was heavily represented at the Special Committee hearings.

Drug prices fell sharply: the greater the number of generic products for a particular patented product, the cheaper that drug was to buy, regardless of whether the particular product purchased was name-brand or generic. In a study done for the Economic Council of Canada, P.K. Gorecki found that between 1970 to 1978, generic drugs generally came onto the market priced 20 per cent lower than the name-brand products with which they were competing (1981 149). With the newly established, provincially-run, and publicly-funded hospital, medical, and drug insurance plans, the federal and provincial governments had become major 'consumers' of health-related services and products, of which pharmaceuticals are an important part. Thus, there developed a major market for the cheaper generic drugs, and the predominantly Canadian-owned and operated generic pharmaceuticals industry thrived (Eastman Commission 1985a 349).

Throughout the 1970's, PMAC and its individual member companies, all of them multinationals, using a number of tactics, continued to resist the expanded system of compulsory licensing and to lobby the government to rescind the legislation, always arguing that their profits, with which they engaged in R&D, were being detrimentally affected.<sup>10</sup> Among the strategies used to resist the

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<sup>10</sup> This claim was later proven to be an sizable overstatement. For more information, see The Report of the Commission of Inquiry into the Pharmaceuticals Industry, 1985. This claim was particularly interesting given the findings of one of the earlier studies on the pharmaceutical industry. Said D.H.W. Henry in his submission to the RTPC:

As an example of the dominant influence of the United States can (sic) be expected to have in the [Canadian] drug industry, it is interesting to note that Lederle Division of



legislation, besides initiating numerous court challenges,<sup>19</sup> PMAC also threatened to withdraw drug products from or not introduce products to the Canadian market, though there is no evidence that either of these threats were carried out. PMAC threatened to reduce its R&D further, blaming the decision to cancel a research project in Montreal on compulsory licensing.<sup>20</sup> They sent to physicians

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Cyanimid with sales in 1959 estimated at \$160 million ... is estimated ... to have spent \$12 to \$16 million on research [in the U.S.] and to compare this with the total expenditure of [approximately] \$2 million reported by ... twenty-two Canadian firms ... In other words, a single firm in the United States spent approximately six to eight times as much on research as did twenty-two Canadian firms which include the largest in the field in Canada (RTPC 1963 Appendix Q 140).

Henry continued:

While the Canadian public derives benefit from research done in other parts of the world, notably the United States ... many authorities in the field feel that more should be done in Canada to support and encourage medical research ... the relationship of most of the large drug manufacturers to parent or related firms in other countries results in the research for such firms being carried on outside Canada (ibid.).

<sup>19</sup> According to Lexchin, by 1971, only two years after the legislation was passed, "... of the 60 licenses issued, there had been 43 appeals before the courts" (Lexchin 1984 171).

<sup>20</sup> According to Lexchin, the drug to be the focus of the research was the same one which the patent-holding company had refused to research several years earlier (1984 175).

letters questioning the effectiveness and safety of generic products, and they cut the price on their products and flooded the market with them just as generic competitors were being introduced (Lexchin 1984 172).<sup>21</sup>

PMAC also made promises to the government to be fulfilled if the offending legislation was repealed. These promises included a commitment to increasing the level of R&D conducted in Canada, though an examination of PMAC's "package" by the Departments of Industry, Trade and Commerce and of Consumer and Corporate Affairs led to the conclusion that the increases promised would have happened even without the desired change in the legislation (ibid. 176). Other promises included initiating a voluntary system of drug prices controls, and increasing "local manufacturing and employment" (ibid. 176).<sup>22</sup>

Despite these numerous threats, promises, and other lobbying efforts, the federal government did not change the Patent Act during

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<sup>21</sup> In 1980, the Swiss owned pharmaceutical company Hoffman-LaRoche was convicted of this activity and fined \$50,000. As Lexchin explains, the company was tried for a violation of a section of the Combines Investigation Act "which makes it an offence to sell a product at an unreasonably low price if the effect is to lessen or eliminate competition" (1984 20). Lexchin continues: "Never before had there been a federal prosecution under that particular section of the Act" (ibid.).

<sup>22</sup> In the public choice model, these various tactics are typical of big business trying to exercise power and influence in its relations with government. They derive their power and influence from the access they have to financial and informational resources, and their ability to withhold them, which are needed by the governing party or the party seeking to attain governmental power. This permits the opportunity for mutually beneficial exchanges of business resources and political favours, including future political favours.

the 1970s.<sup>22</sup> One factor which may have contributed to PMAC's lack of success was the 'tie' the Liberal government likely felt to its compulsory licensing legislation, which had been passed only a few years before. A second contributing factor may have been the more adversarial stance which Trudeau and his government were willing to maintain vis-a-vis the United States, and which may have made them less willing to do the bidding of an association dominated by U.S. multinational corporations. A third factor may have been the apparent importance to the government, and Canadians generally, to have 'made in Canada' public policies that emphasized and supported Canadian business. Finally, as noted earlier, the recent implementation of the various types of publicly-funded health insurance for which the federal government, at least until 1977, was responsible for fifty per cent of the operation costs may also have contributed to the Trudeau government's position.

The Established Programs Financing Act (EPF), which was passed in 1977, formally changed the funding arrangements between Ottawa and the provinces for the Canada Assistance Plan, education and healthcare from shared-cost programs with no budget ceiling for the

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<sup>22</sup> In 1976, the issue of patents and patent protection was reviewed by the Department of Consumer and Corporate Affairs. There was discussion of expanding the compulsory license system to cover the whole patent system rather than just food and medicines. The idea of issuing a six month interim license to applicants seeking pharmaceutical compulsory licenses was also considered. This would have been available on request from the applicant and would have eliminated the usual several months wait for license approval. In the end, however, no changes were made to the act at that time. For further information on this review of the Patent Act see, Department of Consumer and Corporate Affairs. Working Paper on Patent Law Revision. June 1976. Ottawa: Supply and Services Canada, 1976.

federal government share of the programs to a system whereby the federal government provided a closed-ended cash transfer to the provinces and a one-time transfer of tax points.<sup>24</sup> With the passage of Bill C-69 in 1990 and Bill C-20 in 1991, federal cash transfers to the provinces resulting from the EPF Act have been further restricted. The impact of these bills, as Geoffrey Weller and Pranlal Manga note, is that "[federal] contributions have steadily diminished to the point that some estimates indicate that they will fade out altogether by about 1999."<sup>25</sup> In other words, the federal government, because it was responsible for fifty per cent of the cost for these various health-related programs prior to the passing of the EPF Act, had good reason to be concerned about the cost of all aspects of healthcare. The EPF Act and Bills C-69 and C-20, however, by limiting federal responsibility for these programs, reduced the stake which the federal government had in ensuring that

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<sup>24</sup> In fact, the passage of the EPF Act in 1977 was not the first time that the federal government had altered its share of the cost of shared-cost programs. Regarding the medicare program, in 1975, the federal government unilaterally acted to limit the increase in federal government expenditures on this program. It announced that medical care transfer payment for 1976 would be limited to a 13 per cent increase over 1975's expenditure, and the increase for 1977 would be limited to 10 per cent (Barker 1988 208). Even when the EPF Act had been passed, the Liberal government "... unilaterally tinkered twice with EPF funding formula ..." (Gainor 1992 102). For more information on the Established Programs Financing Act and the shared cost programs see, for example, Paul Barker "The Development of the Major Shared-Cost Programs in Canada." in Perspectives on Canadian Federalism. R.D. Olling and M.W. Westmacott, eds., 1988.

<sup>25</sup> Geoffrey Weller and Pranlal Manga. "Protecting Medicare in Canada." Presentation to annual meetings of Political Studies Association of the United Kingdom, University of Leicester, Leicester, U.K., 20-22 April 1993; 7.

the costs of these programs were kept to the minimum; the provinces, in contrast, became responsible for a greater and greater share of the funding.

The late 1970s and early 1980s also saw the development of a global atmosphere of increasing capital mobility with concomitant pressure to reduce trade barriers. In this changing environment, American corporate giants found their competitiveness slipping relative to their foreign competitors. Writing in the mid-1980s, Walter Adams explains that

[by] most objective standards, America's corporate giants have not performed well over the last 15 years. They have lost markets to the Japanese and the newly industrializing countries. They have lagged in innovation. The quality of their products has often been inferior and unreliable (Adams 1987 253).

R.A Young's appraisal of the impact of falling trade barriers on the U.S. and the American reaction is that

[the] flood of imports ... wounded U.S. producers ... and their anger ... hit the political system. The most dynamic sectors ... aimed to open up foreign markets, especially Japan's. More ... sought to defend their domestic market by revving up the engines of protectionism (1987 385).

These protectionist measures included

... nontariff trade barriers such as voluntary restraint agreements, aggressive pursuit of anti-dumping and countervailing duty actions, and unilateral measures mandated by Congress in the Super 301 and Special 301 provisions of the Omnibus Trade and Competitiveness Act (McKinney 1992 x - as quoted in McBride & Shields 1993 133).

Part of the 'Super' and 'Special 301' provisions includes measures to improve the standard of intellectual property protection around the

world and to make it "... easier for U.S. companies to seek relief for violations" (Berenbeim 1989 21). From the perspective of the U.S. multinational pharmaceutical companies, Canada's compulsory licensing provisions for patented pharmaceuticals violated the standard of intellectual property protection which U.S. MNCs were seeking.<sup>26</sup> Consequently, Canada was also affected by the other aspect of the U.S. response to increased competition: growing U.S. protectionism made Canadian exporters fear that access to their primary market might be restricted. Canadian exporters began to press the Liberal government to secure their markets which, in turn, led the Liberal government to "... [toy] with the idea of trying to establish new trade agreements with Washington in a few key sectors ..." (McQuaig 1991 146).

In the context of potential restrictions on Canadian imports to the U.S., the continuing pressure from PMAC on the federal government, by the early 1980s, began showing signs of fruition. Lexchin suggests three other factors which may have contributed to the federal government becoming more responsive to the efforts of the PMAC lobby. The first reason Lexchin suggests relates to the fact that the pharmaceutical industry was concentrated in the peripheries of Toronto and, in particular, of Montreal (Lexchin 1992 3; Campbell & Pal 1989 63). Half of the Liberal caucus was from Quebec which made that province and its concerns particularly important to Liberal

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<sup>26</sup> The multinationals of other nations, such as members of the European Community and Japan, also supported the drive for increased protection of intellectual property (Berenbeim 1989).

leaders if the party was going to remain in power (Campbell & Pal 1989 63). The fact that during this period three multinational pharmaceutical corporations closed their Canadian branch offices, all of which were located in the Montreal area, only served to highlight the need for the Liberal government to re-examine the compulsory licensing legislation.<sup>27</sup> Second, a federal election was going to have to be called shortly (Lexchin 1992 3), and the Liberals knew their popularity was dwindling, particularly in the important region of Central Canada. The third reason which Lexchin suggests concerns the promises PMAC made to increase R&D if the Patent Act was changed to suit the multinationals (1992 3). Obviously, if an industry is concentrated in a particular region, the benefits of any substantial injections of investment in that industry are going to accrue primarily to those living and working in that region. In this case,

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<sup>27</sup> PMAC blamed these closures and the consequent 350 job losses on the compulsory licensing provisions and the federal government's steadfast refusal to rescind them; however, an alternative perspective provided by the CDMA explains these closures as a result of corporate restructuring. In the case of one of the companies concerned, Hoffman-LaRoche, this restructuring resulted in job losses elsewhere including the corporate and research headquarters in Switzerland (Lexchin 1984 176-7). Moreover, during the same period, as is noted in a 1983 Consumer and Corporate Affairs document,

firms such as Ortho, Boehringer, SmithKline & French, Burroughs-Wellcome, Bristol-Myers and Ciba Geigy ... established or expanded Canadian research or manufacturing operations (A Review of Section 41 of the Patent Act 32).

It is also worth bearing in mind that the early 1980s was a recessionary period for much of the industrialized world including Canada, and other businesses, besides pharmaceutical companies, were forced to close or to lay-off employees.

increased investment in the pharmaceutical industry would mean increased investment in Quebec.

In early 1983, Andre Ouellet, Minister of Consumer and Corporate Affairs, sent a letter to the president of the Consumers' Association of Canada -- an organization which had supported the 1969 changes to the Patent Act -- which indicated that change was in the air:

I have recently set in motion a review of compulsory licensing which will initially focus on a proposal put forward by the [multinational] pharmaceutical industry. It is my view that these preliminary discussions should be limited to industry representatives and government officials. If this portion of the review indicates amendment to the Act may be desirable, I intend to initiate a widely based consultative process that will include groups such as the Consumers' Association of Canada (as quoted in Lexchin 1984 179).

In other words, industry and government parties alone would be involved in the "preliminary discussions." Few, if any, opposing interests would be invited.<sup>28</sup> As for the public consultation promised by Mr Ouellet, none occurred, and Lexchin believes that consultation was never in the plans:

On May 27, 1983, at a meeting of the House of Commons Health, Welfare and Social Affairs Committee, Mr Ouellet announced that the government had definitely decided to change the Patent Act. Instead of the full public discussions that Mr. Ouellet promised ... it seems that the only ones consulted in making

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<sup>28</sup> As Stanbury notes, this sort of 'exclusive' access is important in enabling corporate leaders to persuade political to their way of thinking (1988a 420). Ouellet's letter also illustrates how this issue was on the governmental agenda before it was on the public agenda.



this decision were the multinational [pharmaceutical] companies (ibid.).

Despite his statement of intent, things did not go as Ouellet suggested they would. Besides the fact that numerous interest groups -- including the Consumers' Association of Canada, the National Anti-Poverty Organization, and the Medical Reform Group of Ontario -- pressed the federal government to leave the Patent Act as it was, Ouellet was caught up in a Cabinet shuffle, and Judy Erola assumed his role as Minister of Consumer and Corporate Affairs. While she favoured the position of the multinationals, the issue, asserts Lexchin, was becoming too much of a "hot potato", particularly in an election year (1984 181). Likely because of this political pressure, Erola chose to appoint a commission of inquiry into the pharmaceuticals industry.<sup>29</sup>

C) The Issue of Pharmaceutical Patent Provisions  
During the Mulroney Years, 1984 - 1993

The Commission of Inquiry into the Pharmaceuticals Industry (the Eastman Commission), headed by Professor Harry Eastman, was appointed in 1983, but did not make its report until 1985, by which time, the Progressive Conservatives, led by Brian Mulroney, had taken office in Ottawa. The Commission made numerous findings. For

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<sup>29</sup> It is worth noting that shortly after the defeat of the Liberal government, Judy Erola became the President of PMAC. This is just one example of several available of the interchange of players between business and government in the pharmaceutical industry. This is also an issue for both public choice and socialist political economists, but the explanation for this interchange provided by each side would be significantly different.

example, as a result of the extension of compulsory licensing provisions in 1969, the Commission found that PMAC members lost only 3.1 per cent of the market to generic competitors (Eastman Commission 1985a 158). The Commission also found that compared to other developed countries the Canadian pharmaceutical industry, with the exception of the United States, was one of the most profitable in the world (ibid. 277). However, the continued prosperity of the Canadian pharmaceutical industry did not mean that minimal savings were accruing to Canadian consumers as a result of compulsory licensing: the Eastman Commission revealed that through the compulsory licensing system, Canadians had saved at least \$211 million in 1983 alone (ibid. 315).

To the chagrin of PMAC, the Eastman Commission did not recommend any major changes to Canada's compulsory licensing system; the system was deemed to have served Canadians well, and it was assumed that it would continue to do so. The three major recommendations related to compulsory licensing that the Eastman Commission made included: first, that the pharmaceutical patent-holder be provided with four years of patent exclusivity, something which essentially already occurred because of the length of time it took to obtain government approvals for marketing a drug product, even a generic product; second, a change in the method of determining the royalty paid by generic companies for right to make and sell a patented product, resulting in an increase in the royalty paid from four to approximately fourteen per cent; and third, a change in how this royalty was paid to the patentee by making the amount of payment

tied not only to the sales of the compulsorily licensed product, but also to the level of R&D being carried out by the patentee in Canada (Eastman Commission 1985b 8).

With the Progressive Conservatives in power in Ottawa, PMAC re-directed its lobbying efforts. They were now directing their efforts toward a party with which co-operative arrangements had been established at the time the Liberals first expanded the provisions for compulsory licensing and, therefore, the Conservatives had no ties to the 1969 legislation. Moreover, the Progressive Conservatives had made 'noises' sympathetic to PMAC's concerns during the election campaign (Lexchin 1992 4; Campbell & Pal 1989 69). As an example of the favourable comments made by the Conservatives during the 1984 federal election campaign, one of their campaign statements promised:

A Progressive Conservative government would review the Patent Act to ensure that intellectual capital is protected and to allow innovating companies to profit from the investment made in research and development without causing the consumer to pay unduly higher prices for medications (16 July 1984 - as quoted in Campbell & Pal 1989 69).

The Progressive Conservatives, elected on a platform that included reconciliation between Quebec and the rest of Canada, had a substantial proportion of their caucus coming from Quebec, as the Liberal government before them had had. Thus, the regional concentration of the pharmaceutical industry was likely be a factor in any decisions made by the Conservative government regarding the pharmaceutical issue (Campbell & Pal 1989 69). Again like the Liberals before them, the Conservatives were under pressure from

Canadian exporters, facing American protectionism, to secure their U.S. markets. Young explains Canadian exporters' fears and what they wanted the government to do in response to the spectre of increased protectionism in the U.S.:

... prominent are the potential losses from market closure, which swell with each new shipment. Canadian exporters want secure market access; and since American policy is unpredictable, an agreement must enshrine access rights which neither Congress nor a new administration could easily infringe (1987 385).

In this atmosphere, the Mulroney government opted for export-led growth as its primary economic strategy and chose to epitomize this strategy by seeking a free trade agreement with the United States. Both decisions provided PMAC an even better opportunity to press for its cause. This pressure was supplemented by the United States government, including President Reagan himself, responding to the lobbying efforts of the multinational drug corporations -- the PMA -- based in the U.S. (Hoy 1988 196-7).

Though the Mulroney government vigorously denied anything but a coincidental link between the Free Trade Agreement (FTA) and the introduction of Bill C-22, there is considerable evidence to the contrary. For example, in 1985, following the 'Shamrock Summit', where the decision to seek a free trade agreement was first taken, a joint declaration released by Prime Minister Mulroney and President Reagan included a promise that the two nations would undertake action to "... resolve specific impediments to trade ..." and that "... such action will concentrate initially on ... cooperation to protect intellectual property rights from trade in counterfeit goods and

other abuses of copyright and patent law" (as quoted by Frith Senate Debates 16 Dec/92 2487). The only ongoing "abuse" of patent law, from the American perspective, was the Canadian system of compulsory licensing for pharmaceuticals. From the Canadian perspective, there were no areas of concern in this matter (ibid.).

When the U.S. Senate Finance Committee was considering whether the FTA negotiations would be 'fast tracked', one of the Committee members, John Danforth, asserted that if the committee did agree to that route, Canada would have to be willing to make concessions on some specific issues. Those issues included pharmaceutical patent protection (ibid. 2488). Liberal Senator Royce Frith also provided to the upper chamber details of a U.S. document showing that the U.S. government officials had read the draft version of Bill C-22:

The Office of the United States Trade Representative, in its 1986 report on "foreign trade barriers" dealt at length with specific trade irritants. One of the irritants was "compulsory pharmaceutical patents licensing" (sic)... The report goes on to state that in June 1986: "Canada announced the terms of legislation it will introduce in the late fall of 1986 to modify Canada's patent law. This proposed bill is being reviewed to see whether it would provide acceptable patent protection standards" (ibid. - emphasis added).

As Senator Frith asked: "Acceptable to whom?" (ibid.). The Senator also noted that the version of Bill C-22 that was introduced in November 1986 and eventually passed by Parliament, authorized the creation of a drug prices review board with significantly reduced powers compared to the original draft version (ibid.).

McQuaig explains that compulsory licensing was an issue during the free trade negotiations because of Edward Pratt, then chairman of Pfizer, "one of the largest U.S.-based drug companies" (1992 132). Pratt was "... appointed by [President] Reagan in 1981 to chair the government's top private sector trade advisory panel" (ibid.).

McQuaig continues:

The panel carried considerable clout with trade negotiators, Congress and the President. Pratt used this entree to the highest levels of power to get the issue of patent protection for brand-name drugs -- under the guise of protection of intellectual property -- on to the U.S. trade agenda .... With Pratt in the key role of the President's top private sector advisor, it was inevitable that his pet issue of 'intellectual property' was going to be front and centre in any free trade negotiation with Canada (ibid. 132-3).

As one final piece of the evidence linking the FTA and Bill C-22, Lexchin provides the most conclusive example:

The Americans gave the ... proof of the linkage between the two issues the day after the successful conclusion of the free trade talks. A U.S. summary of the agreement said the accord contained a clause "to make progress toward establishing adequate and effective protection of pharmaceuticals in Canada by liberalizing compulsory licensing provisions." It was only after Conservative politicians demanded the removal of that section that it was dropped from the final text of the agreement (1992 5).

Despite the Conservative government protestations to the contrary, it seems clear that Canada's compulsory licensing system was on the free trade negotiating table.<sup>30</sup>

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<sup>30</sup> The involvement of the United States government and U.S. lobby groups in the pharmaceutical issue is an aspect of business-government relations which public choice does not deal with

In formulating the policy which would amend the Patent Act, the Conservative government had several issues to consider. These issues included, on the one hand, the fact that the Eastman Commission had endorsed the value of the expanded compulsory licensing system, the considerable concern expressed by several provinces about the likelihood that pharmacare expenditures would increase if patent protection was extended, the concern of Canadian consumers and consumers' groups for the same reason, and the potential impact of such changes on the mainly Canadian-owned generic sector. On the other hand, the government also had to bear in mind PMAC's demands for at least 15 years of patent protection, the potential impact on Quebec's employment and investment should PMAC members not be satisfied with the policy designed,<sup>21</sup> the substantial proportion of Quebec members in the Conservative caucus, the Conservative party's emphasis on reconciliation between Quebec and the rest of Canada, the government's desire to increase R&D in Canada which PMAC promised to do, and the impact any decision might have on Canada-U.S. relations.

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adequately. Socialist political economy, on the other hand, has the involvement of foreign actors in domestic policy as an explicit part of its theory. See the following chapter for more detail on this issue.

<sup>21</sup> It must be noted that Ontario also stood to gain from increased pharmaceutical investment by the multinationals; however, Ontario's potential gains or losses played little role in the debate of C-22. Also, in terms of R&D spending, according to Robert Andrews, spokesman for PMAC, the multinational pharmaceutical companies do most of their R&D work in Quebec because of the better tax treatment they receive there (telephone interview 13 May/94). In other words, Quebec was more likely to benefit from any increases in R&D spending than was Ontario.

The policy proposed -- Bill C-22 -- restricted, though did not eliminate, the compulsory licensing system. The bill was introduced to Parliament on 6 November 1986, by Harvie Andre, Minister of Consumer and Corporate Affairs,<sup>22</sup> at which time it began a painfully slow journey through Parliament. The Conservatives were forced to invoke closure at every stage of debate, and because the Liberal dominated Senate repeatedly returned the bill to the lower house, the Conservative government was forced to re-examine the bill an "unprecedented" three times (Campbell & Pal 82).<sup>23</sup> Despite the fact that only a few years earlier they had been in essentially the same position as the Conservatives, the Liberal's opposition to the Bill C-22 was vehement.

More than a year after its introduction to Parliament, Bill C-22 was proclaimed into law on 6 December 1987. The provisions of Bill C-22 granted the patent-holding company a minimum of seven years protection from compulsory licensing. After this period, a generic company could obtain a license to manufacture a generic version of the product providing the fine chemical ingredients were manufactured in Canada. If they were not manufactured in Canada, a compulsory license would not be granted for ten years. Since it was still the

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<sup>22</sup> Andre's predecessor, Michel Cote, tried, but, for a variety of reasons, failed to introduce the bill at the start of the summer of 1986 (Lexchin 1992 5).

<sup>23</sup> For a more detailed accounting of Bill C-22's journey through Parliament see R. Campbell and L. Pal The Real Worlds of Canadian Politics: Cases in Process and Policy., 1989; 53-106.



case that very few fine chemicals were manufactured in Canada because of its small market base and lack of multinationals calling Canada 'home', Bill C-22 essentially provided patentees with ten years exclusivity of production<sup>24</sup> (Hill 1989 30-40) and, thus, seriously limited competition in pharmaceutical products on the Canadian market. If a drug was actually developed in Canada, a further bonus was awarded the patentee: compulsory licensing could be postponed until the expiry of the patent -- seventeen years after the filing of the patent -- as long as the patentee was "... making the medicine in Canada for the purposes of completely or substantially supplying the Canadian market for that medicine..." (ibid. 43).

In what appeared to be an attempt to minimize public and political opposition to the restriction of the compulsory licensing system, the bill further provided for the creation of a board that would monitor the prices of patented medicines and their rate of increase. Called the Patented Medicines Prices Review Board (PMPRB), it could upon making the determination that the introductory price of a patented drug was "excessive" or that the rate of increase on a patented drug already on the market was above the Consumer Price Index revoke the patent protection on that drug and/or revoke the patent protection on any other single patented medicine marketed by

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<sup>24</sup> One of the effects of this differential treatment of generic products depending on the origin of the fine chemical ingredients used in their production was that it helped to spur the development of a fine chemicals industry in Canada as generic companies sought to shorten the period of patent exclusivity to which patentees were eligible (CDMA Submission on the NAFTA Jan/93 8).

the same company (ibid. 47-9).<sup>35</sup> Another provision of Bill C-22 was the requirement for a full parliamentary review of the legislation, including the success of the PMPRB in fulfilling its statutory responsibilities. The review was slated for 1996 (Hill 1989 30-40; Patent Act, 1987 Sect. 39.26(3)).

In defending its decision to implement Bill C-22, the Mulroney government relied on five main arguments. The first of these defenses asserted the need for Canada to 'harmonize' its regulations on intellectual property with those of other industrialized countries (Lexchin 1992 5). The second defense provided by the government for Bill C-22 was that not only would Canadians not experience higher drug prices as a result of this bill, but they would be better protected because of the provision for the creation of the PMPRB (Lexchin 1992 8; Andre Minutes Bill C-22 1:13).<sup>36</sup> The third reason given by the federal government for the restriction of compulsory licensing related to the industrial benefits which were

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<sup>35</sup> As explained in Chapter Two, socialist political economy suggests that the capitalist state may implement capital accumulation measures which are thinly disguised as legitimation measures. The creation of the PMPRB appears to fit this description. Chapter Four will provide further examination of this idea.

<sup>36</sup> The government vigorously denied that Bill C-22 would result in higher drug prices; in fact, Harvie Andre claimed that Canadian consumers would be better protected than in the past through regulation of drug prices by the PMPRB (Minutes Bill C-22 1:13). However, a Consumer and Corporate Affairs Report contradicted the government's position noting that the legislation might cost the provinces \$100 million more in drug costs between 1987-91 (Lexchin 1992 8). On receiving the ministry's report the federal government did allocate another \$100 million for provincial transfers over the four year period.

supposed to flow from this bill once passed (Andre Minutes Bill C-22 1:17,19). The government under the Conservatives exhibited great concern about the poor levels of R&D in Canada (ibid.). The multinational pharmaceutical industry promised that if the compulsory licensing provisions for pharmaceuticals were changed the multinational sector would double its R&D to sales ratio (C&CA 1990 4). Though not made a part of the legislation, the government accepted this promise from PMAC. As a consequence of the promised increase in R&D, Andre, along with his Conservative colleagues, argued that not only would Canada derive benefits in the form of jobs, but the country could even become a world class leader in pharmaceutical research (ibid. 1:17).

The fourth of the five defenses was the argument that the large generic companies no longer needed the help of the federal government; they were prospering well, and it was assumed they would continue to do so (Lexchin 1992 5). Finally, the fifth defense was that Bill C-22 would "... accelerate the discovery of new and improved drugs [which] will lead to better health care for all Canadians and lower medical costs (Campbell & Pal 1989 77).

At this point, it is worth noting that prescription drugs, while the smallest component of the overall cost of public healthcare, are increasing in cost more rapidly than any other component. Between 1970 and 1987, prescribed drugs went from less than 0.5 to 4.01 per cent of the total cost of public healthcare in Canada (Gorecki 1992 3). That increase took place during a period when the legislation governing pharmaceutical patents promoted the

proliferation of cheaper generic alternatives to name-brand pharmaceuticals. In 1991, after only three years under the regime established by Bill C-22, the proportion of total public healthcare expenditures attributed to prescription drugs had risen to 5 per cent<sup>37</sup>. Moreover, as earlier noted, this increase was taking place at a time when more and more of the responsibility for these sharp increases is being shouldered by the provincial governments as the federal government reduces its share of funding for healthcare of which pharmaceuticals is an important part.

While multinational sector was pleased with Bill C-22's passage and the consequent changes to the Patent Act, PMAC, its American counterpart, the PMA, and various American trade representatives were completely forthright about their intention to push for even greater patent protection in Canada, either through pressure in the North American Free Trade Agreement (NAFTA) negotiations or through General Agreement on Tariffs and Trade (GATT) negotiations on intellectual property. According the Iain Austen, a Vancouver Sun reporter,

Heavily censored documents obtained by Southam News under access-to-information (sic) laws show that PMAC was actively campaigning to change the [pharmaceutical patents] law in the middle of 1991, six months before the government announced its plans (Austen 4 Dec/92 A7).

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<sup>37</sup> Health Information Division. Policy, planning, and Information Branch. Health Expenditures in Canada, Summary Report 1987-1991. Health and Welfare Canada, 1993 - as quoted by PMAC A Five Year Report on the Canadian Brand-Name Pharmaceutical Industry, 1987-1993. undated. 8.

In other words, PMAC was lobbying the Conservative government at least a year before the legislation was introduced to Parliament.<sup>20</sup> Their wish was for at least the same level of protection granted in the United States and European Community: 17 to 20 years. It should have been no surprise to Canadians that PMAC was actively lobbying the government for further restriction of the compulsory licensing system given the comments of Dr. John L. Zabriskie, Immediate Past Chairman of the Board of PMAC, in his presentation before the legislative committee hearings on Bill C-22:

...I want to say on behalf of our membership that Bill C-22 is not all that we had hoped for, and Bill C-22 in our view, is a compromise bill. It does not restore full recognition of intellectual property; it does not provide our long-sought-after (sic) repeal of compulsory licensing; it does not prevent a generic company from copying our products before our patents expire ...  
(Minutes Bill C-22 3:51).

This statement certainly seems to suggest that more pressure from the multinational sector could be expected. Another indication that there was more to come with respect to the compulsory licensing issue was provided by Michael Wilson, Minister for International Trade. In a meeting with representatives of the generic drug companies in December 1991, he is reported to have said that "... Canada would

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<sup>20</sup> Evidence will be provided in the analysis chapter to show that PMAC began lobbying the government at least three years before the introduction of Bill C-91.

give up its system of compulsory licensing to get a GATT deal in areas like agriculture and textiles" (Lexchin 1992 12).<sup>39</sup>

As earlier noted, the provisions of Bill C-22 legislated a full parliamentary review on the impact of the legislation; however, four years before that date, during the NAFTA negotiations, the federal government proposed a second round of amendments to the Patent Act -- Bill C-91. These amendments provided for the complete elimination of the compulsory licensing system for pharmaceuticals in Canada and the extension of the patent period from seventeen years to twenty years.

The rationale given by the Canadian government and other supporters of Bill C-91 related to the negotiations for the (GATT) and NAFTA. As was the case with Bill C-22, it was also argued that Canada would benefit from extending patent protection. A federal government document designed to explain the NAFTA to the general public provides a good example of the how the Conservatives portrayed the elimination of compulsory licensing. It states:

Increasing the protection on pharmaceuticals is good for Canada. This will create jobs, new investment in research and development, and new opportunities in a large, high-technology industry important to Canada's prosperity. The provisions of the NAFTA on pharmaceuticals are identical to the proposals in the ...[GATT] Multilateral Trade Negotiations. These proposals reflect a multilateral consensus on the need for

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<sup>39</sup> It is interesting that with regard to agriculture, the GATT agreement finally achieved also forces Canada to give up its supply management mechanism, which has worked well to help maintain farmers' livelihoods and maintain supply and price stability for farm produce.

greater patent protection for creators,  
inventors and researchers.<sup>40</sup>

Another aspect -- a highly controversial one -- of Bill C-91 was its retroactive component: any compulsory licenses which had been granted on or after December 20, 1991 would be null and void (Statutes 1993 - Bill C-91 Sect. 12.1). The reason for this retroactivity, according to Corporate and Consumer Affairs Minister Pierre Blais, was that 20 December 1991 was the "... date of Canada's patent commitments under the draft ... [GATT] deal" (O'Neil 8 Dec/92). However, despite the numerous links between Bill C-91 and the GATT and the NAFTA, there may have been other motivations involved. Peter O'Neil, a journalist, quoted a letter from a "powerful U.S. lobby group" to a U.S. representative involved in the NAFTA negotiations. Said the author of the February 1992 letter: "In clear straightforward language, the NAFTA must require Canada to dismantle its discriminatory compulsory licensing regime ... from December 20, 1991 onward ..." (ibid.- emphasis added).<sup>41</sup>

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<sup>40</sup> "Canada and the North American Free Trade Agreement." Issue Series. August 1992; 18. as reproduced in "Legal Opinion of Professor J.G. Castel, O.C., S.J.D., F.R.S.C., Professor International Business Law, Osgoode Hall Law School, York University with respect to Canada's Intellectual Property Obligations Regarding Pharmaceutical Patent Compulsory Licensing Under the General Agreement on Tariffs and Trade ('GATT') and the North American Free Trade Agreement ('NAFTA')." 23 March 1993.

<sup>41</sup> Further evidence of the willingness of the American government to augment the pressure being applied by its multinational firms can be found with the case of Mexico which, while the NAFTA negotiations were in progress, also passed legislation giving the twenty year patent protection on pharmaceuticals which American multinational branch plants in Canada were so desirous of.

The success of the PMPRB in fulfilling its primary responsibility of ensuring patented drugs were not being priced excessively had been limited in its first five years of operation. Non-compliance with the Board's pricing guidelines by PMAC members consistently ranged between 20-30 per cent, and in 1991 non-compliance rose to 40 per cent.<sup>42</sup> This non-compliance problem was largely because the Board had not been given sufficient authority under the 1987 legislation to fulfill its mandate. The provisions of Bill C-91, while eliminating the potential penalty of revocation of patent protection, gave the PMPRB increased powers to impose penalties on those patentees that did not comply with Board pricing guidelines. If an order to reduce the price of an excessively priced drug was not complied with, the Board now had the right to impose a penalty ordering the patentee concerned to pay a financial penalty based on the excess revenues received by the patentee.<sup>43</sup> Previously, the only recourse the Board had if the patentee ignored an order to reduce a drug's price was to revoke the patent protection on the product, something the Board apparently was reluctant to do given that no product was subject to that penalty despite the high non-compliance rates by patentees. Despite these changes to the authority of the Board, all of the provincial governments except Quebec's opposed Bill C-91 because of concerns about rising

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<sup>42</sup> Patented Medicines Prices Review Board. Fourth Annual Report December 3, 1991. "Communique." Ottawa: Supply and Services, Canada, 1992.

<sup>43</sup> The PMPRB will receive further attention in Chapter Four.



pharmacare expenditures (Primetime News 30 Nov 92). The Conservative government, however, argued that because the provisions of government Bill C-91 included strengthening the powers of the Board, such concerns were needless.

Now even the restricted system of compulsory licensing established by Bill C-22 was to be eliminated. Patent holding pharmaceutical companies were granted twenty years exclusivity of production, and, consequently, one can expect that this component of health care expenditures will rise even more steeply than it did under Bill C-22 provisions as a result of the complete absence of generic competition for patented pharmaceuticals.

The Conservative government proposed Bill C-91 despite the fact that PMAC was not fulfilling the promises it made under Bill C-22. A government study obtained by Southam News under the Access to Information Act shows that "[contrary] to the [multinational] pharmaceutical industry's claims in 1987 ... [the passage of Bill C-22 has resulted in] limited net job gain, little growth in basic research and almost no capacity to produce the active ingredients of drugs in Canada" (Vancouver Sun 17 Sept/92 A7). Regardless of the findings of this study, the government chose to defend the new bill with yet more promises from PMAC to spend \$506 million on R&D in Canada (Austen 4 Dec/92 A7), saying that the consequent increase in drug expenditure<sup>44</sup> would be balanced out by the gains made in the

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<sup>44</sup> The federal government, unlike the situation with Bill C-22, did not deny that Bill C-91 would result in increased drug expenditures; however, there were wide discrepancies in exactly how much this extra expense would amount to. The government argued that the legislation would only cost Canadians \$129 million over five

R&D investments. Again, because of the regional concentration of the pharmaceutical industry, much of this investment will likely wind up in Quebec. Moreover, the legislation was proposed and passed by a governing party whose popularity was flagging and whose Quebec members were facing a federal election campaign in which they would have to fight both the Liberals and the Bloc Quebecois. By invoking closure on the bill at every stage of debate, the Conservative government pushed Bill C-91 through the Commons in December of 1992.<sup>45</sup> The Senate passed the bill shortly after the return from Christmas break, and it was given royal assent in early February 1993.

#### D) Conclusion

This chapter has examined the development of pharmaceutical patent legislation from 1923 through 1993. The reasons for the first introduction of compulsory licensing have been noted, as have the reasons for the expansion of the system in 1969, despite the aggressive opposition of the multinational sector of the pharmaceutical industry. Consideration has also been given to the changing economic circumstances in the 1970s and 1980s and how these changes contributed to returning the issue of compulsory licensing to

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years, while some opponents argued that the extra costs would amount to \$7 billion over 15 to 20 years (O'Neil 8 Dec/92 A4).

<sup>45</sup> For a detailed explanation of the rapid passage of Bill C-91 through the Commons, see Senator Royce Frith, Senate Debates 15 Dec/92 2453.

the governmental agenda. Finally, this chapter examined and described the events between 1984 and 1993 that resulted in the restriction and eventual elimination of Canada's compulsory licensing system for pharmaceuticals. With the background of this issue now established, and using the public choice and socialist theories of business-government relations as outlined in Chapter Two, the case study will now move to the analysis of why and how the government eliminated a system which allowed Canadian consumers to purchase drugs at a reasonable cost, and despite the detrimental impact that elimination of the system was likely to have on the primarily Canadian-owned generic sector of the Canadian pharmaceutical industry.

CHAPTER FOURMOTIVATING PHARMACEUTICAL POLICY, 1984-1993

Regardless of whether the analysis is done from a socialist or public choice perspective, the primary actors in this case study remain the same. The Canadian federal government, the multinational and generic sectors of the Canadian pharmaceutical industry are the main actors to be considered when trying to determine why the Progressive Conservative government under Brian Mulroney passed Bills C-22 and C-91, restricting and then eliminating the compulsory licensing system for patented pharmaceuticals in Canada. The ultimate goal of the multinational pharmaceutical companies' efforts through the 1970s to the early 1990s was to have the compulsory licensing provisions for patented drugs eliminated, thus restoring the monopoly of production and sale traditionally afforded patentees, and thereby eliminating generic competition for patented pharmaceuticals in the Canadian market. The multinational sector also wanted to have the period of patent protection extended to at least that granted by other industrialized nations.<sup>1</sup>

On the other hand, the primary goal of the generic sector in the 1980s was to prevent the erosion of compulsory licensing of

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<sup>1</sup> The norm for patent life has, until recently, been 20 years from time of filing patent or 17 years from time the patent is granted (Andre Minutes Bill C-22 1:12). In the early 1990s, the United States and European Community member countries began to increase the length of patent protection granted. It now ranges between 20 to 25 years; however, the period of patent exclusivity is now is a legislated period of 12 to 15 years beginning from the issue of the Notice of Compliance, the approval needed to sell the product on the market (PMAC Minutes Bill C-91 7A:181).

pharmaceuticals -- that is, maintain the status quo -- in order to retain an important source of income. In the early 1990's, their goal was essentially the same except that this time the whole compulsory licensing system was at stake. In both instances, the generic sector failed to achieve its goal.

The aim of the federal government under the Progressive Conservatives led by Brian Mulroney was to successfully implement economic strategies which contributed to Canada's competitiveness compared to other developed countries and which closely adhered to the neo-conservative agenda.<sup>2</sup> The federal government's stated goal, particularly with Bill C-22, was to increase the level of medical research and development carried out in Canada.<sup>3</sup> It might be assumed that an unstated corollary of this was the desire to minimize the cost to the federal government of such an endeavour. Another intent of the federal government during this period was to maintain

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<sup>2</sup> Briefly, advocates of neo-conservatism favour policies which aim

... to shrink the size of the state and to curb its scope, to restore the primacy of market forces, and, particularly, to dismantle the social welfare state, which is still alleged to be excessive, an obstacle to creation of wealth, and a drain on the state's ability to compete economically in international markets (Johnson, McBride, and Smith 1994 4).

Those who favour neo-conservatism also tend to embrace monetarism as an economic policy, and believe in the superiority of the markets in allocating resources in society (ibid. 6-7).

<sup>3</sup> See, for example, Harvie Andre, Minutes Bill C-22, p. 1:12-18.

good relations with the province of Quebec in the hopes of minimizing separatist inclinations.<sup>4</sup>

This case study of the Canadian pharmaceutical industry now moves to a comparative analysis of the development of Bills C-22 and C-91. This exercise will use the two theories of business-government relations earlier outlined: public choice, as exemplified by Stanbury's model (1988a 393-452), and socialist political economy.

## PART I

### PUBLIC CHOICE THEORY - RATIONAL SELF INTEREST

Throughout the 1970s, the multinational drug companies, as represented by PMAC, continued to lobby the federal government in the hopes of persuading it to rescind the compulsory licensing provisions passed in 1969. Even though, as the Eastman Commission would reveal in 1985, the multinationals had only lost 3.1 per cent of the total pharmaceuticals market to generic competition, the multinationals devoted a great many resources to their lobby efforts and during the 1980s, found success with the Mulroney Conservative government. How might public choice explain the decisions of the government which

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<sup>4</sup> Two other actors in this issue were the provincial governments and the Canadian consumer, including consumer groups. The goals of the provincial governments were to control the growth of healthcare expenditures and, in particular, the growth of the pharmacare budgets in order to prevent the need to reduce services and/or increase taxes. A second concern of the provincial governments was to ensure that federal activities which impact on provincial jurisdictions include consultation with and agreement from provincial governments and relevant ministries before being undertaken.

The aim of the Canadian consumer of patented pharmaceutical products was to have access to the best medicines available at a reasonable cost.

favour multinational pharmaceutical companies over indigenous pharmaceutical companies? What were the resources available to those seeking to persuade the government to take a particular decision with regard to the pharmaceutical industry in Canada, and did they offer potential for the conduct of mutually beneficial exchanges with government?

I.A) The Resources of the Multinational Sector Compared to the Generic Sector

Stanbury's framework (1988a) provides a public choice perspective on business-government relations and acts as a guide in an examination of the resources<sup>5</sup> -- for example, money, access, dependencies -- available to, and how they were utilized by the multinational and the generic sectors. Attention in this comparison will primarily be focussed on the two main trade associations -- PMAC<sup>6</sup> and the CDMA<sup>7</sup> -- as representative of the two main sectors of

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<sup>5</sup> In Stanbury's framework, items such as money, organization, and a backlog of political success, are referred to as 'sources or bases of power. I will refer to them as 'resources'.

<sup>6</sup> At several points throughout the presentation given at the legislative meetings on Bill C-91, representatives for PMAC referred to the trade association as the representing the interests of the multinational companies. Phrases such as "... Canada's research-based pharmaceutical industry, as represented by the PMAC ..." were common. For example, see PMAC Minutes Bill C-91, p. 7A:149, 159, 167. As Lexchin says, "[a]ll of the large multinationals belong to PMAC .... PMAC acts as the voice of the multinationals" (1984 33). See also, PMAC Five Year Report on the Canadian Brand-Name Pharmaceutical Industry, 1988 - 1993, 1993, passim.

<sup>7</sup> In a brief outline of the association and the role it plays in society, it is said that the CDMA "... represents the Canadian-owned pharmaceutical industry" (CDMA Quick Facts April/94 1). That statement is followed by the qualifying statement "Its members manufacture safe, high quality generic drugs ...." (ibid.).

the Canadian pharmaceutical industry. The comparison will be on the basis of the following resources: available finances, access to political decision makers, dependent groups (Stanbury refers to this as "patronage"), and the weakness or absence of countervailing power. To conclude this analysis, attention is given to the impact of involvement by the U.S. government in the compulsory licensing debate in Canada. It is this involvement which highlights a weakness in the public choice depiction of business-government relations, as represented by the Stanbury model.

A.1) FINANCES

A.1a) Resistance & Advertising

The financial resources available to the multinational pharmaceutical industry are, evidently, extensive. Stanbury suggests several potential uses for these resources including political donations, advocacy advertising, legal challenges, and lobbying (1988a 405-6). During the debate over Bill C-102 in the late 1960s, PMAC aggressively lobbied against the legislation and, in particular, established a good relationship with Progressive Conservatives, providing Tory members of legislative committees information and direction on how to challenge the government on the issue. In contrast, the CDMA during this period was not very vocal in support of its interests, mainly because there were few generic companies operating at the time and the CDMA itself, having only formed in 1967 (CDMA Quick Facts April/94), was not yet well established. A method commonly used during the 1970s by the multinational patentees to resist the expanded provisions for compulsory licensing was to



initiate legal proceedings against the federal government, challenging its right to grant a compulsory license on a particular patented drug.

There is also considerable evidence that during the Mulroney years, the multinational sector continued to provide PMAC with extensive financial resources in order for the association to represent their interests. For example, following the passage of Bill C-22, PMAC launched a lengthy and wide-ranging publicity campaign which included frequently aired 30 second television advertisements, full-page newspaper ads in major papers across the country (Lexchin 1992 11), and a 36 page ad supplement to Maclean's magazine (11 Dec/89). During the Bill C-91 controversy, PMAC also resorted to using full-page advertisements in the Canadian press. In one such ad, one third of the page read: "Why Bill C-91 is good medicine for Canada", and then explains "... what Bill C-91 will do for Canada and Canadians ..." and "... what Bill C-91 will not do ...."<sup>a</sup> A full-page advertisement in the Globe and Mail costs approximately \$36,500, a full page colour ad in Maclean's costs about \$25,400 (Canadian Advertising Rates and Data, January 1992 - as quoted in Stanbury 1993 376), and a 30 second television advertisement in primetime ranges between \$6000 and \$28,000 depending on the network -- CBC or CTV -- and the program being aired (Stanbury 1993c 376); this does not include the production cost for the advertisement. That PMAC was able to fund such a media campaign

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<sup>a</sup> See, for example, Vancouver Sun 7 Dec/92 - emphasis in original.

is a good indication that PMAC and its constituency had access to ample financial resources.

The CDMA also conducted a media campaign, though it was of a more limited nature. As Lexchin explains, "... over the summer of 1991 ... [CDMA] initiated a series of monthly quarter-page ads in the Globe and Mail, as well as a monthly newsletter, The Straight Facts (1992 10-11). In December 1991, just two weeks prior to International Trade Minister Michael Wilson's revelation that Canada would give up its system of compulsory licensing for a GATT deal,<sup>9</sup> the CDMA took out a full-page ad in the Globe and Mail urging the Prime Minister to keep its "made in Canada pharmaceutical policy" (Lexchin 1992 11-12).

Though the CDMA launched a quite significant media campaign, it was not a campaign of the magnitude of that conducted by PMAC. Public choice theory asserts that the ability to raise public awareness and 'persuade' people through the supply of 'free' information to a particular position on an issue is an important aspect in an organization's bid to having the government take a desired policy decision. PMAC apparently used considerable resources in presenting its position on compulsory licensing to the Canadian public, certainly more than those used by the CDMA in the same endeavour. However, Campbell and Pal describe public support for Bill C-22 as emanating mainly from "the medical establishment, doctors, and life science researchers" (1989 78), while the opposition to the bill emanated from "consumers, healthcare and

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<sup>9</sup> See Chapter Three.

social workers, ... churches" (ibid.), and unions (Minutes Bill C-22). Thus, it would seem that in terms of persuading the 'general public' that Bill C-22 was 'good for Canada and good for Canadians', it appears that PMAC was not successful; average Canadians appear not to have accepted the assertions that the bill would, as Terry Mailloux of PMAC put it, "produce a net benefit for Canada" (Minutes Bill C-22 3:48). This was even more the case with Bill C-91 as even members of the medical community, including doctors, evinced concern about the provisions of the bill.<sup>10</sup> Even in Quebec, the general public was not universally in favour changing the compulsory licensing provisions in the Patent Act. For example, the Quebec consumers' association, the Quebec teachers' union, and the national association of Quebec consumers' associations all opposed Bill C-91 (Hebert Senate Debates 27 Jan/93 2663). In other words, despite its less extensive media campaign, the CDMA generally was more successful in cultivating public support for its position.

The financial resources available to PMAC for advertising were undoubtedly greater than those available to CDMA, though PMAC's use of them in this regard seems not to have made a significant impact on Canadian public opinion.

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<sup>10</sup> For evidence of this concern see, for example, Minutes Bill C-91 4A:13-4; Senate Debates 15 Dec/92 2480; 16 Dec/92 2513-4.

## 1.b Political Donations

PMAC's and the CDMA's advertising campaigns were directed primarily at the Canadian public, which is, of course, important; however, the decision makers which both sectors of the pharmaceutical industry needed were located in the federal government. What tactics were used by representatives of the two sectors to convince decision-makers to their way of thinking? Stanbury suggests that political contributions can "facilitate access" to political leaders and decision-makers (1988a 407).<sup>11</sup> However, a more recent assertion by Stanbury is much less circumspect about the goals in mind when business and interest group leaders make political donations:

The argument that contributions are useful only in ensuring access is both naive and hypocritical. The issue is not really access as such -- it is not too difficult for heads of corporations or other interest groups to meet with cabinet ministers ... to deal with policy issues which directly affect them. The heart of the matter involves the following points. First, large contributions may facilitate access to top political decision makers. Second, large contributions gain additional contacts over and above those arranged through official channels. More contacts may increase the likelihood of persuading the targets to the business's point of view. Third, ... [they] may result in off-the-record meetings in which both parties can be more direct and make arguments that cannot be made officially. Fourth, ... [they] are likely to make politicians more attentive to the arguments of those who make those [large] contributions (Stanbury 1988b 484-5 - emphasis in original).

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<sup>11</sup> During the 1993 federal election, for example, the press reported extensively on Jean Chretien's \$1000 a plate fund-raising evening during which contributors were promised an opportunity to 'chat' with the prospective Prime Minister of Canada.

Did the trade associations for the multinational and generic sectors use financial resources in the form of political contributions as a means of making their case at the federal level?

With a membership of between 60 and 75 companies, most of them multinational, over the past 15 years, PMAC has had considerable financial resources from which to draw. Political donations from PMAC to the Progressive Conservative and Liberal parties from 1983 to 1989 varied quite considerably in terms of the amount of money given and the ratio according to which total political contributions were divided between the parties. In the period from 1983 to 1985, PMAC's total contributions ranged between \$6400 to \$7500<sup>12</sup> split almost equally (50.6/ 49.4) between the two parties (Fiscal Returns 1983-85). It cannot be said that these were a particularly large donations to the two main political parties, though Stanbury notes that they were the largest single contributions to either party by an interest group during this period (1989 375).<sup>13</sup>

Between 1986 and 1989, PMAC favoured the Conservatives over the Liberals by quite a substantial margin. Of the \$18,050 total of donations made by the trade association, \$12,400 (70/30) was donated to the Conservatives. Only in the 1988 election year did PMAC split the \$11,250 total political donation along the lines of the traditionally accepted 60/40 ratio (Fiscal Returns 1986-89).

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<sup>12</sup> Throughout this section, the amount of donations has been rounded to the nearest five dollars.

<sup>13</sup> Stanbury categorizes individual corporations as distinct from interest groups.

In the years 1990 to 1992, PMAC's total political donation jumped considerably compared to previous years; each year had a total donation in excess of \$10,000. Of the \$56,050 donated by PMAC over the three year period, the Conservative party was a recipient of approximately \$35,000, or 62 per cent of it. The year 1990 was interesting because the Liberal party was favoured by PMAC in an 80/20 split of about \$11,000 (Fiscal Returns 1990-92).

Table 4.1

PMAC & CDMA Political Contributions, 1983 - 1992

	1983		1984		1985		1986		1987	
	PC	Lib	PC	Lib	PC	Lib	PC	Lib	PC	Lib
PMAC	3375	3000	3595	3900	3634	3500	3500	357	306	699
CDMA	--	--	--	400	--	--	1515	--	--	2455
	1988		1989		1990		1991		1992	
	PC	Lib	PC	Lib	PC	Lib	PC	Lib	PC	Lib
PMAC	7000	4232	1580	352	1955	8932	15410	2562	17588	9608
CDMA	--	1021	--	999	--	1141	437	667	--	2705

Source: Canada. Chief Electoral Officer. Registered Parties Fiscal Period Returns, 1983-1992

PMAC's political contributions generally favoured the Progressive Conservatives, with only three years of the ten favouring the Liberals. However, it cannot be said that by favouring the Conservatives, PMAC was snubbing the Liberals, particularly in the 1983-85 period. Of the years examined, PMAC gave most generously in 1992 with a contribution to the Conservatives in the amount of \$17,590, a significant donation on its own, but in a pool of approximately \$6.795 million which was donated to the Conservatives by commercial organizations, its significance pales somewhat (Fiscal

Returns 1992). Consequently, PMAC's political contributions were not likely to be, in themselves, sufficient to convince the Mulroney government to make the desired policy decision and rescind compulsory licensing.

Over the period 1983 to 1989, the CDMA gave much less generously compared to PMAC. During the period 1983 to 1985, the CDMA made only one political donation; it was made to the Liberals in the amount of \$400 (Fiscal Returns 1983-85). Given that the compulsory licensing system was clearly being threatened by the pressure tactics of PMAC, it would be reasonable to expect that the CDMA would have given more generously to the parties if they had had the resources to donate. That they gave almost nothing suggests that the necessary resources were not available to the CDMA.

Between 1986 and 1989, as Table 4.1 shows, the generic sector trade association made more regular, though not large, political donations. With only one exception -- 1986 with an amount of \$1515 - these gifts were made to the Liberal party. CDMA's political contributions through this period ranged from a high of \$2455 in 1987 to a low of \$999 in 1989 (Fiscal Returns 1986-89). The fact that the largest CDMA donation over this period was in 1987, the year that Bill C-22 was finally passed, may suggest recognition by the trade association for the Liberals efforts in amending and delaying the proposed legislation.<sup>24</sup> The CDMA's total donation for the years

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<sup>24</sup> The year 1987 was also the only year in which the total CDMA donation exceeded that of PMAC.

1990 to 1992 was \$4,290 of which \$3,850, or 90 per cent, was contributed to the Liberal party (Fiscal Returns 1990-92).

The point to be drawn from this examination is not so much which party was favoured, though that is relevant. Rather, the point to be drawn is that if PMAC and the CDMA were trying to "facilitate access" or even more than access, as Stanbury suggests may be the case with many contributors to political parties, PMAC clearly had available to it financial resources far in excess of those available to the CDMA. Moreover, judging by the almost complete absence of contributions from the CDMA to the Conservatives, it seems that this association's leaders thought its financial resources could be better used elsewhere.

#### 1.c) Lobbying

Another tactic which many organizations use in an attempt to influence government decisions is to hire lobby firms to make contact with political leaders so that their clients can present their argument. The financial resources available to the two sectors of the pharmaceutical industry may be evident in the particular lobby firms which they may hire and also in other aspects of the lobbying effort. A comparison between PMAC and the CDMA in this regard may provide more information as to the 'resources' of the two competing associations.

During the Bill C-22 debate, both trade associations appear to have hired only one lobby firm each to press their case: PMAC hired Government Consultants International (GCI); CDMA hired Skip Wallis



(Campbell and Pal 1989 69).<sup>15</sup> The story, however, was quite different for Bill C-91. Said Liberal Senator Norbert Theriault, quoting information provided to him by Stevie Cameron: "PMAC ... hired five different firms to work for it ... an almost unprecedented range of lobbyists ..." (Senates Debates 15 Dec/92 2472). Cameron herself names some of the lobby firms hired by the multinationals:

...the brand-name manufacturers and their association ... [PMAC] have almost flattened the opposition ... On their side are most of the big firms, such as [GCI], Fred Doucet Consultants International [formerly a partner in GCI], Earnscliffe Strategy Group, and Hill and Knowlton (Cameron 21 Sept/92).

John Chernier of Lobby Monitor said about the multinationals' strategy: "They've hired everyone so no one else can get them" (ibid.). This sort of strategy would, indeed, be an expensive one. Still referring to the information given to him by Cameron, Senator Theriault also noted that PMAC and its member companies were paying ten times as much for their lobbying campaign as was being paid by the generic companies (Senate Debates 15 Dec/92 2472). According to the president of a well-known Canadian lobby firm,

[f]ees ... vary greatly. On a project basis, a clearly defined brief alone would run \$2,500 ("for a short, simple one") up to \$15,000. An onerous time-consuming assignment, like helping a firm lobby for a legislative amendment or other significant change that might take a year, would average \$60-75,000 (Globe and Mail 23 Mar/83 11 - as quoted in Stanbury 1988b 361).

Fees have likely increased since that statement was made.

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<sup>15</sup> The relevance of which lobbyists were hired by the two sectors of the Canadian pharmaceutical industry will be examined in the 'access' section of this analysis.

While not able to excel at the lobbying strategy to the same degree as the multinational sector, the generic sector did not stop trying. About the lobby firms hired by the CDMA, Cameron goes on to say: "The generics have hired Government Policy Consultants, led by Jon Johnson, and James McIlroy of McIlroy and McIlroy" (Cameron 21 Sept/92). Government Policy Consultants is also one of the largest lobby firms in Canada (Lobby Digest March/92).

The lobby firms hired by the two trade associations being considered here are clearly leaders in their field, and the CDMA had access to sufficient financial resources to retain some of these leaders; however, it is obvious that in terms of financial resources available to convert into other resources, such as lobbying and advertising, PMAC again had the advantage over the CDMA. As well, in retaining as many firms as it did, PMAC also had available to it many more potential avenues of access to key decision makers than did the CDMA. The willingness of the multinational trade association to use financial resources in order to purchase other resources provides a good indication of the multinational sector's determination to get the desired policy decision. On the other hand, given the CDMA's relatively small membership, more restrained media campaign, and relatively small political donations, the impression is that the generic trade association would not have had the necessary financial resources to hire more lobby firms, even if they had been available. The conclusion, consequently, must be that the CDMA's apparently more limited financial resources also limited it in terms of competing with the multinational sector in the bid to convince the government

to alter, or not, the compulsory licensing provisions in the Patent Act.

The lobby efforts of the multinational sector were directed primarily at the federal government and at those groups and individuals who might then supplement the lobbying of the federal government. Included in the latter category were, for example, university medical school academics and research centre directors. During the Bill C-91 debate, Ron MacDonald, Liberal MP from Nova Scotia, related a story to Globe and Mail columnist Stevie Cameron about an early morning phone call he had received:

His ... caller, an academic at an Atlantic university, had a message: A senior executive of a major pharmaceutical firm had phoned the day before to offer the university research money. The university had approached the same firm three times before and couldn't get through the front door; suddenly everyone was friendly. The strings attached, however, were clear. The university should try to persuade Mr. MacDonald to back off [his opposition to Bill C-91] (Cameron 21 Sept/92).

In his speech to the House of Commons, MacDonald explained:

In the last 72 hours ... I have received more calls from lobbyists and former lobbyists in this industry who have said things like: "If you would just moderate your opposition to this bill, maybe, just maybe, you can get some [pharmaceutical] investment down in Atlantic Canada" (ibid.).<sup>16</sup>

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<sup>16</sup> Atlantic Canada has always received the lowest proportion of pharmaceutical R&D of all the Canadian regions; in 1988, as an example, the four Atlantic provinces together received only 1.17 per cent of all pharmaceutical R&D invested in Canada (C&CA 1989b 42). By 1992, this proportion had only risen to 1.7 per cent (C&CA 1992 26).

Wanting to ensure that the activities were "on the public record" because "... very rarely do these documents make their way onto [it]" (Senate Debates 16 Dec/92 2498-9), Liberal Senator Anne Cools described in the upper chamber some of the correspondence from the multinational pharmaceutical lobby which had "besieged" representatives on Parliament Hill. Cools singled out three letters which she had received: two from Judy Erola, President of PMAC, and one from Jacques Lapointe, President and Chairman of Glaxo.<sup>17</sup> All three of the letters were asking for the senator's support of Bill C-91 (ibid.). Cools continued:

This constant flood of literature, senators, is overbearing and disturbing, They call it persuasion. I call it lobbying.

In addition, I wish to draw the attention of honourable senators to the November 19 issue of The Hill Times. Within the advertising supplement there is a four page ad from the [PMAC], promoting the benefits of Bill C-91 (ibid.).

Though the earlier mentioned advertising campaign was directed primarily at the public, The Hill Times is an Ottawa newspaper and the four-page PMAC advertisement about which Senator Cools was speaking was likely directed specifically at the high proportion of government officials who would read this particular newspaper.

While the multinational sector focused on the federal government and emphasized the R&D benefits to be had if the Bills C-22 and C-91 were passed, the generic sector directed much of its lobbying efforts at the provincial governments, especially provincial

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<sup>17</sup> Glaxo is a large multinational pharmaceutical company originating from the United Kingdom.

health ministers.<sup>18</sup> They emphasized the higher costs -- with Bill C-91, as much as \$1 billion extra per year -- for pharmaceuticals which would, they argued, result from the erosion of the compulsory licensing system for pharmaceuticals (Cameron 21 Sept/92). Using a Consumer and Corporate Affairs report to support their assertion, the generic companies pointed out that the multinationals had not fulfilled their promises made with the passage of Bill C-22 (ibid.). Evidently, part of the CDMA strategy, perhaps believing another level of government would have more influence on the Conservative federal government, was to get provincial governments to supplement their own lobbying by pressing the national government not to change the status quo.

In the case of Bill C-91, nine of the ten provincial governments did, indeed, try to persuade the Conservatives not to pass the legislation, arguing that the cost of the legislation would be far in excess of the government's figure of \$129 million over five years. For example, the Manitoba government estimated that Bill C-91 would cost the province up to \$150 million more in drug expenditures over ten years (Bonnell Senate Debates 27 Jan/93 2655). The Nova Scotia government asserted that the bill would result in a \$17 million annual increase in drug expenditures (ibid.). With the exception of a few concessions which the provinces made with respect

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<sup>18</sup> The extent to which the CDMA focused on the Quebec government, the only provincial government which supported both Bill C-22 and C-91, and the Quebec health department is not clear. However, Campbell and Pal do note that with Bill C-22, though the Quebec government supported the proposed legislation, "... there was also a broad provincial interest in keeping drug prices down" (1989 79).

to the PMPRB -- for example, a provision that the provinces be "consulted" in future if changes are made to the Board's guidelines (see Statutes Sect. 96(5)) -- the provinces' arguments seemed to fall on deaf ears.<sup>19</sup>

According to the public choice approach, one activity which special interests may do in the effort to achieve their desired policy is to provide political leaders with 'free' information, often in the form of poll and survey results conducted or commissioned by the special interest concerned. The findings of such information gathering techniques usually support the position of the special interest providing the information.<sup>20</sup> PMAC commissioned such a poll at the height of the Bill C-22 controversy. It was conducted by Decima Research and found that 82 per cent of the 1200 Canadians asked agreed with the statement: "I support the Bill [C-22] if the government put in place a way of making sure that drug price increases would not be higher than rate of inflation" (Drug Merchandising April/87 19). The survey also found that "... almost two out of three, after hearing the main arguments for and against the bill, believed the legislation was a good thing. It was a bad thing to 31%" (ibid.).

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<sup>19</sup> The provinces (excluding Quebec) were less condemning of Bill C-22. There was wide-ranging concern about the impact of the legislation on pharmacare budgets and health care generally, but only six of the nine provinces were openly opposed to the bill (Campbell & Pal 1989 79). The fact that the federal government promised \$100 million extra in transfer payments to off-set the impact of drug price increases probably helped to limit provincial opposition. No such promise was made with Bill C-91.

<sup>20</sup> See Chapter 2 for further detail.

Claire Hoy argues that an examination of the structure and contents of the poll explains why the multinational trade association got results which so favoured their position in the compulsory licensing debate. Respondents were asked to listen to a series of pro and con arguments before being asked the survey questions. These questions, Hoy asserts, were 'loaded' given the arguments provided in the preamble (Hoy 1989 112).

The CDMA has also used polling and surveys, the results of which have favoured the generics position. In 1991, the generic trade association did a survey which found, for example, that 70 per cent of those asked believed that the prices of prescription drugs, excluding the dispensing fee, were too high.<sup>21</sup>

In terms of generating information to support their respective positions, it appears that PMAC and the CDMA acted similarly. The information generated by the two competing trade associations was used to demonstrate that they had the support of a majority of the public on their side. Public choice theory asserts that this is important to political leaders because they want to be elected, or re-elected, and, therefore, seek policies which appeal to uncommitted voters.<sup>22</sup> The problem for political leaders becomes, of course, determining whose 'free' information is the more accurate. Stanbury

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<sup>21</sup> CDMA Interview Schedule - including breakdown of responses. December 1991 and March 1994.

The survey taken in 1991 was considerably less detailed than that taken in 1994, though many of the questions were the same.

<sup>22</sup> See Chapter Two.

suggests that when political leaders accept information from interest groups, they

... appreciate the fact that what they receive is not so much likely to be wrong or untruthful, but rather selective in terms of the facts presented and in terms of the interpretation placed upon those facts (1988b 146).

This interpretation will be done in the context of continued efforts by competing interests using various means to convince political leaders, especially those in government, to accept their respective position on an issue. Regarding the contest between PMAC and the CDMA, thus far, it has been shown that in terms of financial resources, PMAC had the advantage over the CDMA, though the latter apparently had more public and provincial government support than its rival. What other resources did the two trade associations make use of in their efforts to convince political leaders to adopt their desired policy?

## 2) ACCESS

In describing the importance of access to organizations seeking particular policy decisions, Stanbury says: "In most cases it is all but impossible to exercise influence in the political process without access to the key actors at crucial times and places" (1988a 407).

In the mid-1980s, with the Conservatives having replaced the Liberals in Ottawa, PMAC sought to convince the new government to rescind the compulsory licensing provisions. It is worth remembering, that PMAC had had a co-operative relationship with the Progressive Conservative party dating from the late 1960s, when PMAC was trying prevent the



passage of the Liberals Bill C-102, which expanded the compulsory licensing system. Also part of the effort to convince the new government to strengthen patent protection for drug products was PMAC's decision to use the lobby firm Government Consultants Inc. (GCI), which Campbell and Pal consider as

perhaps the most powerful and successful lobbying organization in Canada ... [its] staff included a variety of ex-politicians and senior civil servants who knew the names and phone numbers needed to influence policy decisions and ...two [of its three] ... owners were particularly close to the Mulroney government (1989 69-70).

Garry Ouellet, one of the GCI's three owners, had worked with the Conservatives in preparation for the 1984 election campaign screening potential PC candidates for Quebec ridings (ibid. 70). The other owner with close ties to Brian Mulroney was Gerald Doucet, who had been a "Conservative MLA in Nova Scotia and was the brother of Fred Doucet, then senior adviser to Mulroney" (ibid.). Campbell and Pal also note that it was Ouellet who approved the candidacy of Michel Cote, who would become Minister of Consumer and Corporate Affairs, and it was Doucet who "took the lead ... bringing PMAC and Cote together..." (ibid.).

Clearly, this lobbying firm had extensive contacts with senior levels of the new government, including the new prime minister. In a system such as Canada's, where the Prime Minister has an inordinate amount of power, access to the P.M. to plead the case for a particular policy decision may play a significant role in determining which organization or group of organizations succeeds in getting the desired policy. In this situation, the multinational pharmaceutical

companies seem to have had more than one avenue of access to the Prime Minister.

Coleman notes that in Canada, associations "... will sometimes have their chief lobbyist as the permanent president of the association and [he/she] will be supported by a type of corporate secretary who will take care of the running of the organization" (Coleman 1985 418n). With respect to PMAC, this point is relevant: in March 1987, Judy Erola, former Minister of Consumer and Corporate Affairs in the previous Liberal government, assumed the position of President of PMAC.<sup>23</sup> The announcement and brief biographical note in a Canadian pharmacy merchandising publication noted that there were potential benefits to Erola's past employment record:

Mrs. Erola's unique background in governmental affairs ... and business management is well suited to the social responsibility and highly regulated environment which characterize the innovative pharmaceutical industry ... Her extensive international exposure ... will be an asset to the association (Drug Merchandising Mar/87 16).

That Erola would likely have contacts in the government and bureaucracy appears to have been recognized by the PMAC membership. The interconnection between business and political elites, who often

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<sup>23</sup> As a point of interest, Liberal Senator Anne Cools had few words of praise for Judy Erola, her former Liberal colleague:

What we have here is a very compromised former Liberal cabinet minister -- a second or perhaps third rate cabinet minister, not a particularly important cabinet minister at the time, but nonetheless compromised -- has successfully assisted a very hefty industry (Senate Debates 16 Dec/92 2499).

possess common viewpoints, can provide access for business elites to political elites. Said Erola in her presentation to the legislative committee on Bill C-91:

Over the past three years, I and many of the members of the Pharmaceuticals Manufacturers Association of Canada ... have met with many of you to discuss our research-based industry and the challenges it faces in today's global business environment. We have had open, useful and frank discussions ... In these meetings, we have stressed the need for greater harmonization with international intellectual property protection ... (Minutes - Bill C-91 7A:200).

From this statement alone, it is clear that PMAC both had and used access to government elites in the effort to persuade the government to implement their desired policy.

As noted earlier, in the early stages of the Bill C-22 controversy, the CDMA hired Skip Wallis as its chief lobbyist. While not perhaps as closely connected to Conservative MPs as were members of the firm working for PMAC, Wallis was no stranger to the Conservative party, having been Peter Pocklington's campaign manager when he ran for the leadership of the Progressive Conservatives (Campbell & Pal 1989 69). Despite the efforts of Wallis, Campbell and Pal argue that

[the] political tide ... had turned, and CDMA and its lobbyists were unsuccessful in gaining access to those politicians with authority and influence on [the] matter (ibid).

In the case of Bill C-91, it would appear that the generic sector did have access to government officials, usually with bureaucrats from the Department of Industry, Science and Technology,

but occasionally with individuals from Consumer and Corporate Affairs, International Trade, and Health and Welfare. As part of the many appendices which accompany the minutes of the legislative committee hearings for Bill C-91, there is for the period 27 January 1992 to 10 November 1992, a detailed listing of contacts including telephone calls and instances -- for example, an industry seminar which also involved representatives of name brand manufacturers and of the fine chemical industry -- when officials from the generic sector and government officials may have spoken to each other (Minutes Bill C-91 8A:10-11).<sup>24</sup>

While the generic sector does seem to have had contact with government officials, very few of those officials had authority to set policy. There was one visit between generic sector representatives and Michael Wilson, but that seems to be the only instance when access to the "key actors" occurred. Access for generic officials may have been available, but apparently, access to the most influential people was not. Comparing the potential access to key members of the government for PMAC and the CDMA indicates that PMAC, once again, was superior in this resource

The statement made by Judy Erola to the legislative committee hearings also suggests that PMAC pressure for complete elimination of compulsory licensing began at least as early as 1989, only two years

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<sup>24</sup> Judging by the placement of this list, it appears to have been appended to the minutes by the Industry, Science and Technology Department. Interestingly, there is no similar listing, detailed or otherwise, for contact between government officials and the multinational sector.

after the passage of Bill C-22. This may indicate that multinational leaders had a sense of, in Stanbury's terms, a "backlog of political success" (1988a 413). In other words, after the passage of Bill C-22, PMAC officials may have felt that they could capitalize on that success by maintaining a close relationship with government leaders to press for further changes to the Patent Act. Stanbury explains:

Past success in the political arena for any interest group hardly guarantees future success, but it does serve several useful purposes. It provides a generally favourable climate or atmosphere in which to advance new initiatives. It provides corporate leaders with a feeling of confidence ... in their subsequent dealings with government .... In the long run the most important consequences of an interest group's past successes may be ...i) the creation of legitimacy for that group, i.e., when government 'ratifies' a group's position it raises its status merely by such recognition ... ii) the integration of the group into the policy making process so that in the future it is invited to sit at the table when policy changes are discussed (ibid. 414 - emphasis in original).

In other words, a backlog of political success can also create opportunities for access to decision makers. It is worth noting, however, that PMAC officials, even without a 'backlog of political success' were invited to participate in discussions of policy change even when the Liberals were examining the patent legislation issue in the early 1980s. Moreover, the initial discussions with government decision makers were held without the involvement of other interested parties that had a contrasting position from that of the multinational drug companies.<sup>25</sup>

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<sup>25</sup> See Chapter Three for further detail.

In the case of the CDMA and its member firms, they did not really possess any 'backlog of political success'. Of course, compulsory licensing had been expanded in the 1960s, but given the 'infant state' of the generic sector at the time, they cannot be credited with that policy decision. Furthermore, the 1969 legislation was passed by a Liberal government intent on cutting drug costs, half of which were being paid for by the federal government, a burden for which the Mulroney government was becoming less and less responsible. In other words, the generic sector did not have any history on which to rely when the Conservatives decided to examine the issue in the 1980s.

### 3) PATRONAGE BY LARGE CORPORATIONS

#### 3.a) Employees

Another resource which may be available to big business is, in Stanbury's terms 'patronage by large corporations'(1988a 408), or more simply, the dependency of other social groups on the corporation(s) or industry. Stanbury describes this issue:

So long as those who control the corporation have any discretion in their decision making they are in a position to favour one group of employees over another, to favour one supplier of raw materials ... the senior management (or owners) of most large corporations are able to exercise a considerable degree of discretion in dealing with its various stakeholders. Such discretion is an obvious source of power (1988a 408-9 - emphasis in original).

Stanbury continues:

Perhaps one of the most obvious situations in which large corporations are able to exercise

both economic and political power is the 'company town' or fairly isolated region within which a firm employs a substantial fraction of the labour force (ibid.).

This situation can provide the corporation or industry concerned with a resource which can be used in mutually beneficial exchanges between business and government, exchanges which are crucial to the public choice depiction of business-government relations. This issue does play a role in Canadian the pharmaceutical industry, but it has been of more value to the multinational sector than it has been to the generic sector.

The most significant group 'dependent' on the multinationals are the employees of these companies. The Eastman Commission found that in 1982 the number of employees in the non-generic sector of pharmaceutical industry was approximately 12,700 (Eastman Summary 6).<sup>26</sup> In 1992, the employment figure for PMAC members was approximately 17,000 (PMAC - Minutes Bill C-91 7A:156). Throughout the debates on Bills C-22 and C-91, the issue of employment was a topic of discussion. Part of the reason for this was that in the context of falling trade barriers and the increasingly 'global' nature of the world economy, there were some suggestions that if Canada did not provide the patent protection desired by the multinationals, the country might even lose its branch plant pharmaceutical industry, with pharmaceutical products being imported from countries providing the desired benefits to the industry.

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<sup>26</sup> As a point of interest, the 1969 employment figure for the entire industry was 12,645; however, very few of these employees were employed in the generic sector (Eastman Summary 6) .

Conservative Senator Consiglio Di Nino provided an example of such a suggestion during the Senate debates on Bill C-91 when he said:

We should all be aware of the fact that the pharmaceutical industry is in the process of global restructuring. In deciding where to relocate its research or manufacturing activities, drug companies are looking for areas that are offering them significant advantages .... medicines do more than just treat and cure illnesses. They also [could] contribute a significant export item to this country's balance of trade. (Senate Debates 27 Jan/93 2652-3).

The suggestion was that if the Canadian system of compulsory licensing was not eliminated then the process of global restructuring being undertaken within the pharmaceutical industry threatened the jobs of the 17,000 employees working in the multinational sector.<sup>27</sup>

The argument that the jobs of Canadian employees of multinational firms were at risk might have been persuasive under any circumstances, regardless of where the majority of those employees were concentrated, if they were concentrated at all, but the fact is that, as was earlier explained,<sup>28</sup> the multinational pharmaceutical industry is concentrated in Central Canada (See Table 4.2), and its

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<sup>27</sup> For further comments from representatives of PMAC and the Conservatives who spoke on this issue see, for example, Di Nino - Senate Debates 27 Jan/93 p. 2652; Kelly Senates Debates 27 Jan/93 p. 2667; PMAC Minutes Bill C-91 7A:156).

<sup>28</sup> See Chapter Three.



Table 4.2

Location of PMAC Members, 1994

Members in Ontario	-	39
Members in Quebec	-	22
Members elsewhere	-	<u>2</u>
<u>Total Members</u>	-	<u>63</u>

Source: PMAC Member List 1994

R&D activities are concentrated in Quebec (See Table 4.3) (Andrews 2 May/94). The importance of the industry to Quebec can be ascertained by the Quebec government's support of Bills C-22 and C-91, even when, in the latter case, all the other provinces' governments were vocally and vigorously opposed to it.<sup>29</sup> During the lengthy passage of Bill

Table 4.3

Current R&D Expenditures by Location, 1991 - 1992

Location of R&D	1992		1991		% Change 1991/1992
	(\$M)	%	(\$M)	%	
Atlantic Provinces	6.5	1.7	3.9	1.1	66.7
Quebec	181.5	46.2	164.4	46.2	10.7
Ontario	170.2	43.3	156.5	44.0	8.8
Western Provinces	34.4	8.8	30.9	8.7	11.3
Yukon and N.W.T.	0.1	0.03	0.0	0.0	n/a
Canada	392.7	100.0	355.3	100.0	10.5

\*Current expenditures exclude capital equipment and depreciation expenditures

Source: PMPRB Fifth Annual Report December 31, 1992.

<sup>29</sup> Current figures for the division of pharmaceutical employment between Ontario and Quebec are not available. The Eastman Commission found that in 1982, 88.7 per cent total pharmaceutical employment (multinational and generic) was located in Ontario and Quebec. Quebec accounted for 39 per cent; however, Eastman predicted that this percentage would increase as a plant closure in Quebec had just resulted in 280 pharmaceutical job losses (Eastman Report 419). Total employment for the pharmaceutical industry (multinational, generic, and 'other') was 22,600 in 1992, but no breakdown of that figure is available (Statistics Canada - as quoted in PMPRB Fifth Annual Report 22)

C-22 through Parliament, the Quebec government even accused the Liberal dominated Senate of "acting to delay patent change, which would bring \$660 million in new R&D activity to Quebec" (Campbell & Pal 82).

The compulsory licensing issue ranged from a matter of industry concentration in Quebec to one of regionalism and national unity. That the issue was of importance to Quebec clearly was a concern for Prime Minister Mulroney, who criticized the actions of the Liberals in the Senate. He asserted that their delaying the passage of government Bill C-22 was

... having the effect of choking off \$700 million of investment going right into the province of Quebec and 1300 jobs in science and technology -- the kind of jobs Quebec has been dying for years (sic) .... Liberal senators ... are in the process of inflicting very serious and perhaps irreparable damage to the scientific well-being of Quebec (as quoted in Campbell & Pal 85).

He later alleged that "the Liberal party is inflicting industrial catastrophe on Montreal" (ibid.).<sup>30</sup> Even if for no other reason than the economic advantages which would accrue to Quebec, the multinational sector had the support of the Prime Minister.

The concentration of the multinational R&D activities in Quebec benefitted the sector not only because of the resulting concentration of its employee base, but also because of the characteristic competition between the Canadian regions and the French-English tension which exists in this country. In general, the issue of

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<sup>30</sup> The Montreal area of Quebec is the area of greatest concentration for the name-brand drug industry in terms of its R&D activities (Andrews - telephone interview 2 May/94).

concentration of the industry in Quebec was more delicately handled during the Bill C-91 debate. Liberal Senator Royce Frith made one of the more overt references to it when he made his presentation in the upper chamber:

Clearly, to the extent that we create jobs and economic activity in Canada through research and development and through the manufacture of fine chemicals, it is a good thing ... To a degree, in the province of Quebec, it is perceived that that will be the case. However, in no other province does that seem to be the view held .... is it fair to tax all Canadians in this particular area to give rise to activity that largely occurs in only one region? (Senate Debates 16 Dec/92 2496).

Liberal Senator Michael Kirby also noted the regional aspect of the debate:

The fact is that, historically, 90 per cent of the money spent on drug research in Canada has been spent in Quebec and Ontario. The fact is that drug costs are paid by all Canadians ... it is very important that the drug companies recognize the regional reality of Canada and begin to deal more fairly with medical schools, particularly in places such as Nova Scotia, Winnipeg and Vancouver, and stop concentrating all of their money and all of their research dollars in the central part of the country (ibid. 26 Jan/93 2633).

The concentration of the Canadian pharmaceutical industry in Central Canada, and, particularly, in Quebec clearly gave the multinational sector of the industry leverage in its demands for changes to the compulsory licensing system. Having a federal government with a significant Quebec caucus would only have enhanced that leverage. But the characteristic of industry concentration in Central Canada is not descriptive only of the multinational sector:

the generic sector is also concentrated in this region (see Table 4.4), though more so in Ontario than in Quebec (Eastman Commission 1985a 419). However, in 1982, the generic sector accounted for only 1300 jobs (Eastman Commission 1985b 6). Compared to the number of jobs in the multinational sector, those in the generic sector likely

Table 4.4

Location of CDMA Members, 1994

Members in Ontario	- 10*
Members in Quebec	- 6
Members in B.C.	- <u>1</u>
<u>Total Members</u>	<u>- 17**</u>

\* The two largest generic companies are located in Ontario.

\*\* Total is down from 19 in 1993.

Source: CDMA Members List, April 1994

seemed insignificant, especially when considering their concentration in a province other than Quebec. While important electorally to the government, Ontario was not likely to cause a national unity crisis, nor was it the home province of the Prime Minister.

By January of 1993, the generic sector "... employed over 2,600 people in communities across the country" (CDMA Submission on NAFTA Jan/93 1), jobs which, the CDMA argued, were being threatened by Bill C-91. The generic trade association also argued that potential jobs, primarily in Ontario and Western Canada, were being threatened by the new bill because it would restrict the growth of the sector:

... the federal proposal will make it impossible for the Canadian-owned sector [i.e, the generic companies] to create the thousands of new jobs that would have resulted from continued growth under the existing system.

The elimination of compulsory licensing will jeopardize the future of several significant research and development

facilities planned by the Canadian-owned pharmaceutical industry in Ontario and Western Canada (CDMA Fact Sheet June/92 6).

Furthermore, because the bill prohibited generic companies from manufacturing for the purposes of export, the industry would likely be forced to export jobs by setting up facilities in other countries, namely the U.S., in order to produce drug products whose patents have expired elsewhere before they have in Canada (CDMA Exports Facts Sheet undated).<sup>21</sup>

Compared to the job figures of the multinational sector, the job losses, real and potential, of the generic sector apparently seemed quite minor to the decision makers in the Mulroney Conservative government. Under the provisions of Bill C-91, the generic companies could still manufacture off-patent drugs and those drugs for which compulsory licenses had been granted before 20 December, 1991 -- the date to which Bill C-91 had been made retroactive. Though there would be no more compulsory license possibilities forthcoming, it was argued that with off-patent and previously compulsorily licensed products, the generic sector had plenty with which to make a living.<sup>22</sup> It seems that the federal government, in fact, discounted the claims of CDMA member companies.

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<sup>21</sup> This aspect of Bill C-91 will be given more detailed treatment in the socialist political economy section of the analysis chapter.

<sup>22</sup> See, for example, FMAC Minutes Bill C-91 7A:190; Beaulieu Senate Debates 26 Jan/93 2626.

3.b) Medical Researchers

The issue of R&D and where it occurs brings to light another 'dependent' group: the Canadian scientific research community. This group was also almost universally in favour of the two bills. Universities and medical researchers depend on research grants from various sources, including the government and drug companies, in order to carry out their studies; however, between 1984 and 1991, the federal government's share of total grants for medical R&D made fell from 35 per cent (of \$630 million) to 26 per cent (of 1,318 million).<sup>33</sup> This figure is for "R&D in the Health Field"; however, the PMPRB, whose figures are for pharmaceutical R&D, suggests that the federal government was much less prominent in pharmaceutical R&D than in the more general health field (See Table 4.5).

Table 4.5

Total R&D Expenditures By Source of Funds, 1988 and 1992\*

Source of Funds	1988		1992	
	(\$M)	%	(\$M)	%
Company Funds	161.3	97.3	401.8	97.2
Fed/Prov Gov'ts	1.8	1.1	8.3	2.0
Others	2.7	1.6	3.3	0.8
Total	165.7	100.0	413.4	100.0

\* Includes capital equipment and depreciation expenses  
Does not account for federal and provincial R&D tax credits  
Source: PMPRB Second and Fifth Annual Reports, modified.

Whichever figures you rely on, researchers had to rely significantly on monies provided by pharmaceutical companies. This situation helps

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<sup>33</sup> Statistics Canada. Gross Expenditures in Research and Development (GERD) in the Health Field. Science, Technology and Capital Stock Division, 1985 & 1992 - as quoted in PMAC advertising supplement in Maclean's 11 Dec/89; PMAC - Minutes Bill C-91 7A:172.

to foster "alliances" between the industry and medical researchers and "broaden ... [the] base of support" for the industry (Stanbury 1988a 409). In the case of Bill C-22, PMAC's decision to hold off new research activities in Canada until the bill was passed likely only served to reinforce the support of the research community (Campbell & Pal 1989 83). Moreover, the R&D promises made by PMAC members during the Bill C-91 debate were also contingent the passage of the bill.<sup>24</sup>

The CDMA also conducted pharmaceutical research and development. Said Luciano Calenti, Chairman of the CDMA at the time, during his presentation to the legislative committee on Bill C-22:

...we are also engaged in research at the present time ... But our daily bread is dependent on the generic products, without which we could not fund the rest of our research (Minutes Bill C-22 3:36).

Leslie Dan, President and owner of Novopharm, the largest of the generic companies, explained that his company "spends over \$7 million a year on original research, primarily to develop medications to help fight cancer" (McMurdie 2 Dec/91 75). As a percentage of sales, CDMA member companies were consistently increasing their investment in R&D, moving from about seven per cent to slightly more than 13 per cent between 1988 and 1992 (CDMA Quick Facts April/94 1). In 1992, CDMA members "targeted more than \$500 million for R&D over the next ten years", and two CDMA member companies in a recent Globe and Mail study placed in Canada's top 50 companies for R&D investments (CDMA

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<sup>24</sup> Andrews, PMAC spokesperson, telephone interview, 13 May 1994; See also PMAC - Minutes Bill C-91 7A:156, 182, 202.

Impact of Bill C-91 Jan/94 9-10). That research monies were to be had from the generic sector seems clear, but what was also clear was that they were not as plentiful over as short a timespan as those promised by the multinational sector.

In terms of the groups which were "dependent" on it, PMAC had more leverage in dealings with political leaders than did the CDMA. PMAC's employee base was much larger than that of CDMA, and those employees were concentrated in Central Canada. The politically sensitive issue of Quebec and its position in the Canadian confederation only served to enhance the leverage PMAC's 17,000 employees provided it. CDMA, on the other hand, had in excess of 2600 employees located primarily in Ontario. Though concentrated, CDMA's 2600 employees contrasts sharply with PMAC's employee figures.

The same multinational concentration in Central Canada and the fact that these companies do most of their R&D in Quebec also added strength to PMAC's position. Again, while CDMA also conducted research, it could not compete with the potential R&D which PMAC members might have funded, nor could it compete in terms of the impact if those R&D investments were withdrawn.<sup>35</sup>

Though not categorized in Stanbury's model, the resources examined in this analysis were essentially of three types. Economic resources and those resources which can be purchased with economic

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<sup>35</sup> Precise figures for R&D conducted by the generic companies are not available. A rather imprecise 'chart' which CDMA provides in their brief "The Impact of Bill C-91 on Canada's Health System" shows that from 1988 to 1993, the CDMA, as noted earlier, increased their R&D expenditures from approximately 6.5 per cent to approximately 13 per cent (Jan/94 10).



resources represent the first type and include, for example, money, information gathering, advertising, expertise, lobby firms, to name a few. Many of these resources can be used as 'donations' to political leaders as they seek to determine the electorate's preferences and the business interest seeks to persuade political leaders to adopt their policy preferences.

The second type of resource could be called 'positive resources.' While many of these resources can be purchased, they are not automatically available with the possession of economic resources, nor are they necessarily absent without access to financial resources. Resources in this category might include a 'backlog of political success', organization, and access to political decision makers. Access can, of course, be purchased, but it does not have to be. Personal ties between individuals, or the recognition of similar viewpoints or similar concerns between political and business elites may well be sufficient to increase access granted to one interest that might not be available to another interest with greater economic resources.

The third category of resources might be called 'bargaining resources' and consists of both positive and negative components. For example the leverage derived from the threat of or the actual withdrawal of some level of activity could be used as the basis of an exchange with government. This leverage may be based on the dependency of a groups such as employees, or the research community, as in the pharmaceutical case study. An example of a bargaining resource used by the pharmaceutical industry are the R&D investment

promises which they made on the condition that the government pass the compulsory licensing legislation.

#### 4) Weakness/Absence of Countervailing Power

One of the factors which Stanbury asserts as increasing the power of large corporations is the relative weakness or complete absence of any "countervailing power" (1987 397). As was outlined in the background chapter, the absence of any counterweight to the multinational position clearly is not a factor in this case study; however, the countervailing power that was present was relatively weak. For both Bills C-22 and C-91, several interest groups, such as the Consumers' Association of Canada, the National Anti-Poverty Organization, the Canadian Health Coalition, and the Canadian Labour Congress, to name just a few, actively campaigned against changes to the compulsory licensing system. Though provincial opposition to Bill C-22 was somewhat less pronounced, Bill C-91 was vigorously opposed by nine out of ten provinces; in both cases, Quebec was the exception. More importantly, at least from the public choice perspective, there were the generic companies, as represented by the CDMA, opposing the two bills.

This is important because the majority of the other opposing interests were consumer groups in some form or another. The generic companies, however, were producer groups, which according to public choice are more likely to influence government than are consumer groups. Downs asserts:

[Individuals] are much more likely to exert direct influence on government policy

formation in their roles as producers than in their roles as consumers. In consequence, a democratic government is usually biased in favor of producer interests, even though the consumers of any given product usually outnumber its producers (1957 149).

Joe B. Stevens explains why government is more responsive to producers:

Firms within any industry are likely to be more homogenous than their consumers, and they may be organized into trade associations ... Because they are fewer in number than consumers, firms have higher per capita gains than are imposed on consumers as per capita losses ... (1993 214).

Even the provinces were a 'consumer' group of a sort in that they paid for the drug products used in hospitals and purchased by provincial residents under the provincial pharmacare plans. The provincial governments' position was different from that of other consumer groups in that they, like the federal government, have constitutional authority to act in specific policy fields and to use coercion if necessary to implement policy decisions. The impact of Bill C-22 and C-91 on the provincial jurisdiction of healthcare was significant; however, because the bills amended patent policy, an exclusively federal jurisdiction, the provinces had no authority to prevent the federal government from passing the amendments to the Patent Act, despite the repercussions of the legislation on the provinces' healthcare responsibilities. They could protest the passage of the legislation, which nine of the provincial governments did in the case of Bill C-91, but they could not do anything more than protest. In that respect, their position was similar to that of other consumer groups opposing the legislation.

## B) Rational Self-Interest?

As was explained in Chapter Two, according to the public choice perspective, the fundamental goal of rational, self-interested politicians is to be elected, or re-elected as the case may be. In order to do this, as Downs asserts, they "... formulate policy strictly as a means of gaining votes" (Downs 1957 137). As a consequence of this goal, politicians and their political parties need resources in order to determine the policy preferences of the electorate or, more precisely, the uncommitted portion of the electorate (Hartle 1984 67 - in Stanbury 1988b 131). This need for resources on the part of political parties opens up an opportunity for special interests -- business interests in this case study -- to offer money or other resources to the party in exchange for consideration of the interest's preferred policy options. These same interests, in Down's terminology "persuaders" (ibid. 147), are often also providing 'free' information to the public in attempt to persuade them to adopt the same policy preferences as those of the special interest group.

With respect to this case study, it is clear that the business interests attempting to persuade the federal government under Brian Mulroney were the two trade associations -- PMAC and CDMA -- each representing one of the two sectors of the Canadian pharmaceutical industry. Having examined the background to this issue and using the details of the public choice analysis, it becomes evident that both trade associations used several methods in their attempt to persuade the federal government to adopt their respective position on the

compulsory licensing issue. In a competition between CDMA and PMAC to provide the better 'package' of resources with which an exchange with the federal government could be made for the preferred pharmaceutical patent policy, PMAC, as this analysis demonstrated, clearly had the better reserve of resources on which to draw. It provided substantial political donations to the Conservative party, particularly in the late 1980s and early 1990s. It had the 'bargaining' resources with which it could make significant promises of increased R&D investment. The reverse of that was also true: PMAC suggested that the Canadian government might find itself having placate Quebec over job and investment losses if patent protection was not improved for pharmaceuticals. Given the fact that issues concerning Quebec are always highly sensitive, the concentration of the multinational sector in Quebec was a significant resource when added to the suggestion that PMAC members might move their facilities elsewhere should the Canadian government not provide the desired 'business climate.'

Of course, compared to the CDMA, PMAC also had a superior reserve of resources with which the organization could present its position to the federal government. It had the financial resources to hire lobby firms with good connections to the governing party. It had a president, Judy Erola, who, having been a cabinet minister herself, had a good knowledge of the government and bureaucratic structure and the individuals to contact within them.

The CDMA clearly had less in the way of economic resources, as evidenced by its comparatively small political donations, more

limited media campaign, and its more restrained approach to hiring lobby firms. The CDMA also did not have the access to key decision makers that appears to have been available to PMAC. The one 'resource' which the CDMA did seem to possess the better reserve of was public and provincial support of its position, despite the extensive PMAC media campaign. Even with Bill C-22, when provincial opposition to amending the compulsory licensing provisions was less definitive, a majority of provinces still opposed the proposed legislation. Under these circumstances, the CDMA seems to have focused more on demonstrating to the Mulroney government that a majority of the Canadian public supported its position on the compulsory licensing issue.

If, as public choice theory asserts, the primary goal of politicians is to be elected or re-elected and, therefore, they seek to formulate policies which are favoured by the electorate, why then did the federal government implement a policy which did not seem to be favoured by the Canadian population? The first response to that question may lie in the idea that the politicians do not seek to formulate policies supported by a majority of the electorate; rather, they want policies which appeal to uncommitted voters. As Hartle says: "...rewarding the faithful is unnecessary and rewarding the staunch opponents is futile ..." (Hartle 1984 67 - in Stanbury 1988b 131).

With the Conservatives traditionally strong in the West (Smith 1989 143), the Mulroney Conservatives in the early years of its tenure in government may not have been concerned about "rewarding the

faithful"; moreover, the West accounted for a much smaller share of the seats in Parliament. Central Canada, however, with such a large proportion of the Commons seats, was where attention had to be focused if satisfying the uncommitted voter was the priority with the Conservatives. Quebec, traditionally Liberal (ibid.), would likely have been particularly important given the concentration of the multinational sector of the pharmaceutical industry in this province. The fact that the Prime Minister was from Quebec and the party had run on a platform of reconciliation between Quebec and the rest of Canada, after the divisive repatriation of the Constitution by former Liberal government, likely served to enhance the importance of Quebec's satisfaction in the compulsory licensing issue.

Concern about Quebec at the time of Bill C-91 was also likely to have been prominent within the Conservative party. With an upcoming election in which the Conservatives would be facing both Liberal and Bloc Quebecois opponents, the failure of the Meech Lake Accord, and the continuing constitutional debates over the summer of 1992, providing benefits to Quebec might have appeared to be an answer to an apparent problem. In this situation, the promises and the threats made by PMAC members may have been very convincing, especially given the support of the PMAC position by the Quebec provincial government.

What about Ontario? For both Bill C-22 and C-91, the Ontario provincial government was opposed. This is interesting given that the multinational sector is also heavily concentrated in Ontario. The generic sector, including the largest generic companies, is also

concentrated in Ontario (See Table 4.4). Given that Ontario has the greatest proportion of Commons seats, it is curious that the Mulroney government did not appear to be concerned by the province's opposition to the legislation.

Having considered the position of the federal government with respect to the compulsory licensing issue, it seems clear that PMAC did have the better bargaining position compared to that of the CDMA. However, thus far, it seems that most of the leverage available to PMAC derived from the multinational sector's concentration in Quebec. But it would not be 'rational' for the leaders of the Conservative party to be concerned only about the satisfaction of Quebec; as unevenly distributed as Canada's population is, any party wanting to be elected or re-elected has to satisfy more than just the province of Quebec. Given the opposition, particularly with respect to Bill C-91, to amending the compulsory licensing provisions, it seems clear that this was not a policy which appealed to voters. Moreover, it was a policy which could have been seen by many Canadians as "...crassly practicing the dictums of marginal-voter politics ..." (Stanbury 1988b 154), an activity which Stanbury asserts party leaders do not want to be seen to be doing (ibid.).

#### C) Support from Foreign Governments

Another aspect which strengthened the multinational sector's demand for the elimination of compulsory licensing, was the involvement of the United States government in a Canadian public policy issue. The generic sector had no such support deriving from



foreign governments. Though the federal government denied anything but a coincidental link between the introduction of Bill C-22 and the FTA, there is considerable evidence<sup>36</sup> that not only were the two issues linked, but that passage of the FTA by the United States government was contingent on the passage of Bill C-22 in Canada.<sup>37</sup> The Mulroney government chose to fulfill its economic strategy of export-led growth through the implementation of a free trade agreement, the completion of which also satisfied to a large extent Canadian exporter demands about securing access to U.S. markets. This decision, however, provided an opportunity to the U.S. government to apply pressure on the Mulroney government to eliminate a system which had a negative impact on U.S. multinationals' profits, thus limiting the repatriation of profits to the U.S. by those multinationals. The situation was similar for Bill C-91 and the NAFTA, and the fact that Mexico also passed legislation extending its patent length and protection of patent rights for pharmaceuticals<sup>38</sup> suggests that the U.S. government was acting to support the interests of its multinational pharmaceutical companies.

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<sup>36</sup> See Chapter Three.

<sup>37</sup> For a detailed consideration of the linkages between the U.S. government, Bill C-22 and the FTA, see the Senate Debates 26 January 1993, p. 2487-91.

<sup>38</sup> See Chapter Three and the socialist theory section of Chapter Four for further detail on these issues.

The involvement of the U.S. government, and for that matter foreign interest groups,<sup>39</sup> in this issue was an important, if not necessary, aspect of the multinational sector's successful achievement of their goal to have compulsory licensing eliminated in Canada. This involvement, however, is not something which Stanbury's public choice model deals with adequately.

Stanbury's model would likely depict this involvement as just one more resource available to those who possess allies in other countries, but the involvement of the U.S. government in this issue raises the possibility that it was not the pharmaceutical industry involved in the exchange relationship with the Canadian federal government, but the U.S. government. Maybe it was both. The problem is that Stanbury's public choice model does not allow for the complexity of relationships which is standard in politics, especially international politics. When the analysis is confined to PMAC, the CDMA and the federal government, considering their respective goals and resources, the picture appears quite clear. Compared to the CDMA, PMAC was clearly in the better position to conduct 'mutually beneficial exchanges' with the Mulroney government. Using this model, the reasons for such 'exchanges' between PMAC and the Conservative government seem discernable. But reality, of course, is far more complex than this limited examination portrays; the context in which these exchanges take place cannot be so easily excluded. Stanbury's framework does not allow for the complexity of relationships between

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<sup>39</sup> As noted in the background chapter, the Pharmaceutical Manufacturers Association (PMA), the American counterpart to PMAC, was also a factor in the compulsory licensing issue.

various actors and events. Consequently, Stanbury's public choice model is too narrowly focused. While it provides a means of examining specific relationships, Stanbury's model offers few clues as to how understand the significance of those relationships in the broader political context.

In this respect, socialist theory of business-government relations may offer some answers.

## PART II

### SOCIALIST THEORY - CAPITAL ACCUMULATION

In the early 1980s, the impact on Canada of the growing trend towards the 'global economy' and the consequent decline in trade barriers and the increasing mobility of capital became more and more apparent. Already a country heavily dependent on the operations of foreign multinationals, this change in the world economy served to increase the country's potential vulnerability to the demands of multinationals that they be provided with accumulation incentives for them to locate or maintain their operations in the country. Both sides of the political spectrum recognize such demands are occurring. Said, for example, Conservative Senator William Kelly during the debates for Bill C-91:

We have to understand that, among other things, Bill C-91 is about investment. Investment capital is fluid; it knows no boundaries .... Canada must compete with a host of other countries for its share of this investment capital ... (Senate Debates 27 Jan/93 2667).

How might socialist political economy explain the circumstances of this case study of the Canadian pharmaceutical industry and is there evidence to support this explanation? Does a socialist portrayal of business-government relations offer an explanation of features of the Canadian pharmaceutical industry case study not covered by the public choice depiction?

#### II.A) An Explanation According to Socialist Theory of Business-Government Relations

Socialist theory assumes that the primary function of the state is capital accumulation. Legitimation, while important, is secondary because it acts to enhance the state's primary function. It also assumes that there is a split or division within the capitalist class between 'monopoly capital' and 'competitive capital'. In the Canadian pharmaceutical industry this split corresponds with the division between the multinational sector -- 'monopoly capital' -- and the primarily Canadian-owned generic sector -- 'competitive capital.' In Canada, this division between the two forms of capital is even more pronounced because there are no Canadian multinational pharmaceutical companies. Consequently, when the state acts to improve the potential for capital accumulation for 'monopoly capital' in the pharmaceutical industry, the impact on 'competitive capital' is more likely to be negative because the generic sector essentially competes with the multinational sector. Moreover, because there are no Canadian multinationals in this industry, the capital accumulation benefits conferred on the multinational sector do not automatically provide spin-off benefits, such as reinvested profits, to the

Canadian public and the Canadian economy; the bulk of increased profits resulting from enhanced capital accumulation by the multinational sector are more likely be funnelled out of the country to be repatriated to the MNC's home country. However, in order to maintain its legitimacy and to maintain 'social harmony' -- the legitimation function according to socialist political economy -- the government likely tried to a) make it appear that the benefits accruing to the multinational sector were not particularly significant, b) argue that the disadvantages for the generic sector were not particularly onerous, and c) assert that there were also benefits accruing to the Canadian public.

A second aspect suggested by a socialist political economy model, and also relevant to this case study, is that decisions by the Canadian government benefitting monopoly capital were the result of increasing pressure on governments to compete with governments of other jurisdictions to provide the desired enhancement of accumulation potential. According to this explanation, the Canadian government's decisions benefitting monopoly capital in the pharmaceutical industry were a result of this international competition to attract business investment to the competitors' respective jurisdictions.

As noted in Chapter Two, 'monopoly capital' can penalize those governments, and their economies, which do not provide an economic environment deemed by 'monopoly capital' to be compatible with continued and increasing capital accumulation. In the case of the Canadian pharmaceutical industry, the measures desired by the

multinational companies were increased patent protection for pharmaceuticals and the eventual elimination of any mechanism which eroded that protection. The threatened penalty, both implicit and explicit, if the Canadian government did not abide by the demands of the multinational sector was flattened investment or even de-investment by the multinational pharmaceutical industry, which would inevitably lead to job losses and a negative effect on the Canadian economy generally. The fact that the majority of any jobs lost would be in Quebec raised the always sensitive English Canada versus Quebec issue and provided the multinationals increased leverage in their demands of the Mulroney Conservative government.

A third aspect of this socialist portrayal of business-government relations concerns the likelihood that multinational corporations' parent states augmented the MNC pressure on the host governments of their MNC branch plant operations. In this case study, the United States government added an extra element of leverage to the demands of the mainly American multinationals that the Canadian government amend the Patent Act and eliminate compulsory licensing and increase protection of patent rights. There is considerable evidence, more of which will follow, which strongly suggests that the U.S. government made the completion of the FTA and the NAFTA contingent on improving patent protection of pharmaceuticals, the majority of patents for which are held by American pharmaceutical companies. In other words, the U.S. action with respect to this case study conforms to this component of O'Connor's socialist political economy. All of these developments,

within the pharmaceutical industry and throughout the Canadian economy, have an impact on the ability of the state to continue performing its legitimation function.

This is an explanation from the socialist perspective for the policies which the Mulroney government passed and which first restricted and then eliminated a system which had maintained lower drug costs for the Canadian public and allowed a primarily Canadian industrial sector to develop. Is there evidence that this explanation corresponds with events as they occurred? Is this scenario a plausible explanation for the Canadian government passing Bills C-22 and C-91, despite considerable public opposition to the legislation? Is there any evidence that these were not, as the federal government argued in the case of Bill C-22, a 'made in Canada' piece of legislation, nor, in the case of Bill C-91, simply a necessary consequence of the NAFTA and GATT agreements?

#### B) Benefits Accruing to Multinationals Are Not Significant

During the Bill C-22 debate in 1986-87, one of the arguments that the proponents of the bill used to support it suggested that nothing would really be any different with Bill C-22 than it was before. About the pharmaceuticals markets in Canada, Harvie Andre, then Minister for Consumer and Corporate Affairs, said at the legislative committee hearings for the bill:

... when a drug is introduced, the price is established by market forces. That was true prior to 1969; it is true today; and it will be true in the future ... It will have a monopoly in the future; it has a monopoly

today; it had a monopoly prior to 1969  
 (Minutes Bill C-22 1:13).

The point he was making was that nothing would be any different under Bill C-22; however, with respect to the operation of market forces, they can hardly be said to be working in the case of the monopoly permitted with patents. Market forces, almost by definition, require competition in order to operate. Moreover, if the decision to use a drug means the difference between life and death for someone, and there is a monopoly on the sale of that drug, it seems obvious that the patentee can essentially charge whatever it desired because when the alternative to paying for an overpriced drug is death, or even chronic ill-health, there really is no alternative. With compulsory licensing market forces were operating which may have resulted in lowered priced options available for those unable to afford brand-name drug products. With the restriction of compulsory licensing, so too were market forces restricted. Myron Gordon and David Fowler explain this situation of "price inelasticity":

Given the emergency circumstances under which drug are usually purchased, it is reasonable to expect that their demand is relatively price inelastic, that is, the quantity purchased is insensitive to price. [Under health insurance], the doctor, as customer, prescribes, but does not pay for the drugs, and probably does not even know the prices. The net effect is to increase price inelasticity even further (1981 22).

Liberal Senator Royce Frith explains the difference between patents on pharmaceuticals and those other inventions:

A [new type of] mousetrap might add convenience to a person's life and, if the price was reasonable, an individual would have made a wise and defensible decision in



choosing to purchase it. But what price would be reasonable when what is at issue is not convenience, or a mouse living under the veranda, but life itself? ... that is the fundamental difference between patents on medicines and patents on all other inventions. It is the difference between added convenience and added life (Senate Debates 16 Dec/92 2485).

According to the arguments of the Conservative government during the passage through Parliament of both bills, this difference between patents on medicines and those on other inventions is no longer relevant. Said Andre during the legislative hearings on Bill C-22:"... we will be respecting the fundamental principle that whether you invent a new camera, a new mousetrap, or a new drug, you are entitled to the same period of exclusivity to utilize that invention" (Minutes Bill C-22 1:18).<sup>40</sup>

Disregarding for the moment, the issue of whether the two bills being considered in this case study favoured foreign interests in the pharmaceutical industry over Canadian interests, the first thing which needs to be considered is whether the bills were, in fact, designed in such a way as to facilitate capital accumulation. This is necessary if the events under examination are going to be explained by a socialist model of business-government relations.

Dealing first with Bill C-22, the first aspect which should be considered is the extension of the patentee's period of exclusivity in the manufacture and sale of the patented pharmaceutical product before a compulsory license could be granted. There was no mandated

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<sup>40</sup> See comments by Conservative Senator Mario Beaulieu, Senate Debates 26 Jan/93 for further consideration of this issue.

exclusivity period prior to the 1987 amendments, though there was usually a de facto period of at least four years before a generic version of a patented drug would be approved for sale (Eastman Commission 1985a 376). Bill C-22 proposed an exclusivity period of seven or ten years depending on whether the fine chemicals for the generic product were made in Canada (seven years) or not (ten years).

At first glance, this extension of the patentee's monopoly on a pharmaceutical product certainly appears likely to enhance the capital accumulation potential of patent-holding pharmaceutical companies. However, the Conservative government argued that the patentees would not benefit inordinately because of the time it takes for a patented product to reach the market, a consequence of the drug safety testing, and the fact that there is usually a considerable lag before a compulsory license will be requested and granted. The result is that with a seventeen year patent life "[on] average, at year 16.5 or about 11.5 years after the brand-name comes on the market, the generic equivalent comes on the market" (Andre - Minutes Bill C-22 1:11). Andre, making his presentation to the legislative hearings for Bill C-22 advanced an interesting position: "... I submit [the proposed amendments] may not in fact have much effect on the average time in which generic competitors come on the market" (ibid. 1:12). In other words, the increased exclusivity proposed would not add significantly to accumulation potential of patent holding firms.

If this was the case, two puzzles become apparent. First, why bother to pass the legislation if it was not going reduce

substantially the competition to which brand-name products were subject and thereby increase the patentees' potential for increased capital accumulation? Second, why were not only companies in the multinational sector of the Canadian pharmaceutical industry, but also American pharmaceutical companies and the U.S. government lobbying the Canadian federal government so hard for legislation which was not going to make much difference?

Responding to concerns about the likelihood of extended patent exclusivity, Andre asserted: "I want to make the point as emphatically as I can that nothing we are doing will cause the rise in price of any drug currently on the market, nor indeed any future drugs" (Minutes Bill C-22 1:12-3). Andre went on:

There is no question that generic competition causes the price [of drugs] to come down ... the cost to the provinces might be a little higher if [generic] competition has to wait until seven rather than four [years]. But in no way will prices be higher (ibid.).

Andre seems to have been playing a bit of a semantics game, saying extended protection from generic competition does not mean that prices will go any higher, they simply will not go any lower because of the absence of generic competition. If the "cost" to provinces is going to be higher, whether "slightly" or not, it means that the patentees would have to be earning more money as a consequence of the extension of patent exclusivity.<sup>41</sup> In other words, this provision

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<sup>41</sup> Moreover, any higher cost to the provinces is, in reality, going to be borne by the taxpayer, another aspect of the socialist thesis (O'Connor 1973 6-9).

of the bill did offer the potential for enhanced capital accumulation.

Turning now to Bill C-91, did it facilitate capital accumulation? Two of the main components of this bill were the proposal for the complete elimination of the compulsory licensing system for pharmaceuticals and the extension of patent life from 17 to 20 years. Again, on the face of it, this certainly appears likely to improve patentee profitability. A comparison of drug prices in the U.S. for brand-name products not subject to generic competition with the prices of the same product in Canada but subject to generic competition suggests the potential profits for multinational drug companies with full patent protection (See Table 4.6).

Table 4.6

Price Comparisons Between Selected U.S. Brand-Name and Canadian Brand-Name and Generic Drug Prices, 1986\*

Generic Name	Generic Can Pr	Brd Name Can Pr	Brd Name US Pr	Brd Name Brand Name
Hydrochlorothiazide	\$ 43.73	\$127.55	\$255.12	Dyazide
Oxazepam	\$ 11.00	\$ 86.48	\$644.38	Serax
Cimetidine	\$ 84.15	\$265.43	\$496.60	Tagamet
Naproxen	\$145.95	\$382.35	\$593.58	Naprosyn

\* All prices for purchases of 1000 units.

Source: Ottawa Citizen, 26 June 1986 as reproduced in Canadian Union of Public Employees Minutes Bill C-91 7A:9, substantially modified.

Again, the federal government argued that the benefits accruing to the patentees would not be significant because, as Conservative Senator Wilbert Keon explained, the average extension of exclusivity would only amount to an extra three years:

... [this bill] will extend by an average of approximately three years, from 17 to 20, the period of market exclusivity for the pharmaceutical industry which will make it equal to other industrial countries .... the government has estimated that the additional cost to the health care system between now and 1996 will be in area of \$125 million to \$150 million (Senate Debates 15 Dec/92 2467).

Moreover, the "additional cost" would be offset by the more than \$500 million of new R&D promises. In their four page summary of concerns about Bill C-91, Liberal senators suggested a few reasons as to why these numbers were misleading:

Liberal members ... are totally unconvinced that incremental increases in drug costs will be limited to \$129 million over five years, as claimed by the federal government. The only witnesses [to the Senate committee hearings] who supported the government's estimate were PMAC, the principal beneficiary of Bill C-91, and Dr. Heinz Redwood, former Head of Corporate Planning at Fisons, a large British pharmaceutical company. The committee heard compelling testimony from four provincial governments, two consumer groups, one private insurer and various other organizations and individuals. None of these witnesses agreed with the federal government cost estimates ... (Senate Debates 26 Jan/93 2645)

The Liberals' report continues:

It is inconceivable that these exceptionally profitable [pharmaceutical] corporations would open themselves to public scrutiny, and expend so much time energy and resources in return for a marginal increase in annual sales. The government's cost estimate for C-91 of \$129 million over five years represents an annual increase in sales of 0.6 per cent for the industry. To push so hard for so little, as PMAC has done, defies common sense.

The industry's promise to invest [over \$500 million] in return for \$129 million in new

revenues has been greeted with skepticism (sic) by many witnesses and by Liberal members ... An industry which promises to spend five times more than it expects to receive is headed for bankruptcy (ibid.).

These points are reasonable and logical; patent holders are not likely to expend the vast resources as did PMAC in its lobby efforts nor make the investment promises that it did without expecting a return on their 'investment'. Thus, while it may not yet be possible to prove that the extension of the patent life to twenty years and the elimination of compulsory licensing enhances the accumulation potential of the pharmaceutical patentees, it is reasonable to assume that it does simply because the alternative is not at all convincing.

#### C) Patent Provisions are Not Onerous for Generic Companies

Of course, one important characteristic of the Canadian pharmaceutical industry is the fact that it is not only an industry with two competing sectors: generic and name-brand; the two sectors are also divided in terms of the origins of the firms in each sector. The patentees are almost all foreign multinationals, while a majority of the companies which utilized the compulsory licensing system to manufacture generic versions of patented pharmaceuticals are Canadian-owned and operated. In other words, the legislation that the Mulroney government passed, first restricting and then eliminating compulsory licensing in Canada, provided this enhanced capital accumulation potential to foreign-owned companies, and provided it to the detriment of the indigenous generic pharmaceutical companies.

As O'Connor's model posits will occur, the Canadian government favoured 'monopoly capital' over 'competitive capital'. Given that there are no Canadian multinational pharmaceutical companies, much of the benefits, in the form of increased profits being reinvested in the economy, accrue to foreign countries, rather than to Canada. Stephen Schondelmeyer, Professor of Pharmaceutical Economics and Director of Prime Institute at the College of Pharmacy at the University of Minnesota calculated the profits that the multinationals would likely earn as a consequence of the extra period of patent monopoly provided by Bill C-91:

Six of the 37 products [already on the market] affected by ... [Bill C-91] are Merck products ... Merck's six products are expected to add as much as \$780 million in sales revenue cumulatively by the year 2000 and another \$624 million between 2001 and 2010. The total added cost to Canadians from Merck drug products could be over \$1.4 billion .... Pharmaceutical expenditures will be 15% to 20% higher over the next 20 years because of Bill C-91 and less than one-eighth of that amount is expected to be re-invested in Canada and its economy (Economic Impact Analysis 21 Jan/93 9 - emphasis added).

Not surprisingly, the federal government argued that, in fact, the legislation was not going to be particularly onerous for the generic companies. The government's position was that there were plenty of off-patent drugs with which to make a living. During the Bill C-91 controversy, Senator Di Nino, for example, said:

This legislation provides the generics with a period of transition. There were some 14 products already granted before December 20, 1991. These can be brought to the market as before. In addition, there are close to 2000 off-patent products that will be available to

the generic companies that they have yet to copy. The best sellers of these alone represent about \$180 million a year in current sales. In addition, let us not forget that over half of the business of the generic drug industry involves drugs which patents have already expired. Clearly, the scenarios of doom and gloom for the generic industry do not fit the facts (Senate Debates 27 Jan/93 2653).

Putting his point a little more forcefully, Senator Beaulieu asked:

Why is such a fuss created over a body of firms that simply exists by copying remedies, and especially why should we put this whole debate in the context of a pro and con, pitting the generic companies against the inventors of remedies? Because the first are Canadian and the others are not? This is truly a weak debate .... Why should we ever think that this law will kill the generic firms when we know there are more than 2,000 medications whose patents have expired ... They could copy from here to eternity with that potential (ibid. 26 Jan/93 2626).

Senator Kirby responded to this argument by noting first, that the patent-holder could obtain a new patent for an old product simply by making minor changes, such as developing a timed release product or an enteric coated product (ibid. 2630), and second, that

[the] government is absolutely correct when it states that when the first patent expires it would be possible for a generic company to manufacture that product and put it on the market. However, the reality is that, from a marketing standpoint, the product would not sell. The reality is that what would [sell] ... on the market is the chemical delivered by way of a system which is more up to date ... the generic manufacturers could produce it but it would not sell .... How many ads have members of this chamber seen selling products that are new and improved? The new and improved version would have received a new patent, which would then apply for another 20 years ... this government's calculations are based on the assumption that



even though a better mousetrap exists,  
everyone will buy the old one (ibid.).

Moreover, as the Eastman Commission notes, "... the generic industry grew to significance because of the profitability of compulsory licensing and might well not have obtained a share of the post-patent market without that base" (1985 349). To put Senator Kirby's and the Eastman Commission's point a different way, the revenues derived from compulsory licensing were important part of the generic sector's income, and it was a part which would not be as easily substituted as the Conservatives argued it would be.

There were other provisions in Bill C-91 which were contrary to the interests of the predominantly Canadian-owned generic sector. For example, Bill C-91 eliminated the ability of the generic companies to manufacture drug products for export if they were still under patent in Canada. In other words, even if the drug is no longer patented in the country to which the exports are destined, with Bill C-91's provisions in place, generic companies are still not permitted to manufacture it (CDMA Impact of Bill C-91 Jan/94 6). The most they are permitted to do is to manufacture a patented product for the purposes of obtaining regulatory approval in Canada or another country, or once regulatory approval has been granted, to manufacture and stockpile the patented product in readiness for the expiry of the product's patent whereupon the stockpiled product would be permitted on the market (Statutes - Bill C-91 Section 55.2(1)). As the CDMA explains in one of its information releases, this provision forces the generic companies to export jobs because they have to set up facilities outside of Canada in order to take advantage of expired

patents in other countries when they have not yet expired in Canada (Exports Fact Sheet undated).

Regarding this prohibition of generic exports of drugs still patented in Canada, Liberal Senator Jacques Hebert reported that officials in the Department of Consumer and Corporate Affairs had recognized that this was a problem, but explained that they were concerned that if exports were not prohibited, there would be a problem of "leakage", with the exported product getting back into the country (Senate Debates 27 Jan/93 2664). This, however, is very unlikely because the Canadian drug market is so heavily regulated and product "leakage" would have to have both a notice of compliance and a drug identification number (ibid.). There do not appear to be any Canadian beneficiaries of this provision; the only beneficiaries appear to be the multinational pharmaceutical companies.

Even the limited rights to manufacture for regulatory approval purposes have been eroded. In March 1993, one month after Bill C-91 was proclaimed, regulations developed under the authority of Section 55.4 of the bill were announced. These regulations gave patent-holding companies the right to delay the process of generic companies obtaining regulatory approval by alleging patent infringement. Regulatory approval will not be granted until any legal challenges have been resolved or the passage of 30 months, whichever comes first, and it is up to the generic firm to prove that it is not infringing the patent in question. No opportunity to participate in the development of these regulations was granted to the generic sector (CDMA Section 55.2 Regulations undated). Given that this is

exactly the provision that PMAC officials requested in their presentation to the Commons committee hearings on Bill C-91,<sup>42</sup> it would be reasonable to assume that PMAC was involved in the development of these regulations.

Though the exact number of lawsuits which have been initiated by patent-holding companies was not revealed, the CDMA asserts that there are several now ongoing (CDMA Impact of Bill C-91 Jan/94 7). The parallels and potential parallels between this situation and the one in the early 1960s are clear. At this time, the Director of Investigation, D.H.W. Henry, noted the proclivity of the multinational companies to delay the granting of compulsory licenses "... as long as they could, to the point where it was hardly worth the trouble ... of most existing small manufacturers to successfully undertake an application (Lexchin 1984 167). Some of the generic companies are much larger now, but most of them are not.<sup>43</sup>

That these provisions favour the interests of the multinational sector and disadvantage the generic firms is clear, but these provisions are extreme in the degree to which they favour the

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<sup>42</sup> See Judy Erola Minutes Bill C-91 7A:203-4; PMAC Minutes Bill C-91 7A:192.

<sup>43</sup> The Eastman Commission found that in 1980, the average number of employees for foreign-owned pharmaceutical companies in Canada was 211 persons; the average number of employees for Canadian-owned pharmaceutical companies was 36 persons (1985a 61). The Commission also found that the "... ratio of the number of employees per establishment for Canadian-owned [pharmaceutical] firms to the number of employees per establishment for all foreign-owned [pharmaceutical] firms ... has been falling over the last four years" (ibid.). Using this as an indication of the firms financial resources, it is probable that most of the generic firms would be unable to afford the expense of lengthy legal battles with multinational firms.

multinationals. Canadian jobs are likely to be exported and potential export markets are being closed to Canadian firms. Access for Canadians to generic drugs once patents have expired may be delayed, thus giving even further extended monopolies to the former patentee, because generic companies may be unable to get regulatory approval for their generic products until legal challenges have been resolved or 30 months have passed. Since the average life of prescription pharmaceuticals is about two years,<sup>44</sup> it would not be sensible for the generic companies to begin the regulatory approval process much before this time.

#### D) Benefits Accrue to Canadians

Another feature of the socialist model is the secondary function of the capitalist state of maintaining social harmony. As O'Connor says, "[t]o insure mass loyalty and maintain its legitimacy, the state must meet various demands of those who suffer the 'costs' of economic growth" (1973 8). With respect to Bill C-22 and C-91, there is evidence of the Mulroney government attempting to fulfill this function, or at least trying to appear to be doing so by disguising measures intended to enhance the accumulation potential of capital (O'Connor 1973 6). With Bill C-22, for example, a Consumer and Corporate Affairs document revealed that, contrary to the Conservative government's initial declarations, the bill would likely result in \$100 million in extra costs to the provinces (Lexchin 1992

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<sup>44</sup> Harminder Bufal, Vancouver, B.C. pharmacist; telephone interview, 7 May/94.

8). The federal government, consequently, allocated an equivalent amount to be paid to the provinces over the following five years and intended to cover the extra costs.

Bill C-22 was a piece of legislation which, because it concerned the granting of patents, was exclusively controlled by the federal government. The impact of the bill, however, was going to be felt substantially by the provincial governments given their constitutional authority over healthcare and the federal government's move to limit transfer payments for health and social services. The decision to allocate \$100 million extra for pharmaceutical costs may have subdued provincial opposition to the bill, but no such monies were allocated for the provinces with Bill C-91, and this deficiency may be related to the fact that all the provinces except Quebec vociferously opposed the bill.<sup>45</sup>

The creation of the Patented Medicines Prices Review Board (PMPRB) would also conform to the idea of the federal government trying to maintain its legitimacy and maintain social harmony. As Andre asserted:

Nothing we are doing in any way affects [the] market, except perhaps the drug prices review board which will have a downward pressure on the introductory price (Minutes Bill C-22 1:13).

In other words, not only was the legislation not going to result in higher drug prices, but, according to Andre, the operation of the

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<sup>45</sup> Regardless of whether it was the provincial or federal governments which paid the extra costs resulting from the legislation, it was the Canadian taxpayer who was going to be paying in the end, which again corresponds with socialist theory of the capitalist state (O'Connor 1973 7-8).

Board would likely result in lower drug prices for the Canadian consumer. The creation of the PMPRB certainly seemed to be the answer to many of the numerous concerns raised by various parties about the impact of restricting compulsory licensing. Appearing to operate in much the same way that the Canadian Radio and Telecommunication Commission (CRTC), which is supposed to ensure, among other things, that telephone rates do not rise precipitously given the monopoly telephone companies have in local service, the PMPRB was likely expected by the Conservative government to ease the public's fears about the period of monopoly being granted the patent-holding companies. On the work of the PMPRB since its creation, Senator Beaulieu explained:

The prices of patented drugs have remained at reasonable levels. In fact, as we have said repeatedly, price increases were lower than the increase in the cost of living. To protect against excessive pricing, a control mechanism was established in 1987 and has done excellent work (Senate Debates 26 Jan/93 2627).

With Bill C-91, the powers of the PMPRB were increased purportedly to compensate for the fact that the proposed legislation would eliminate the Board's option to revoke patent protection and allow compulsory licenses on drug products that were excessively priced. Beaulieu explained these changes as well:

The Board may order the selling price of a patented drug to be reduced to such an extent as will offset the excessive revenues. It can now double the financial penalties. Companies that refuse to comply with such orders will now incur fines of up to a \$100,000 a day, while individuals will be liable to fines of up to \$25,000 or a jail sentence (ibid.).

The provisions which created and then strengthened the PMPRB certainly appear to be intended to protect the 'public interest' and, therefore, likely to win the support of the Canadian public and help to maintain the legitimacy of the government.<sup>46</sup> But is this appearance the reality? The Conservative government created an independent board, but did it provide the Board with the powers to fulfill its mandate? The comments on the average rate of increase for patented pharmaceuticals made by Beaulieu in the Senate suggest that the Board was given sufficient powers under Bill C-22, but Senator Beaulieu's statement seemed to contradict the earlier point about the high rate of non-compliance with pricing guidelines which the PMPRB was encountering from patentees.<sup>47</sup> Is it possible that there can be a rate of non-compliance as high as 40 per cent -- the rate in 1991 -- and yet have average annual price increases remaining below the rate of the cost of living? Are there aspects related to the jurisdiction of the PMPRB which compromise its capacity to fulfill its mandate?

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<sup>46</sup> Given the number of opposing presentations in the Commons committee hearings and the Senate committee hearings on Bill C-91, despite their truncated nature, it seems that consumers groups were not convinced of the PMPRB's determination or authority to fulfill its mandate. Interestingly, the PMPRB, in its Fifth Annual Report, released several months after the passage of Bill C-91, responded to criticisms that it was "ineffectual because only one public hearing had been called in the five years of its existence" (i). This, the Board's Chairman, Harry Eastman, asserted, was a "misapprehension" (ibid.). For further detail see "Chairman's Message," PMPRB, Fifth Annual Report, pages 1-11.

<sup>47</sup> See Chapter Three.

With respect to the conflict between average annual price increases of patented drugs and the rate of non-compliance, the answer likely lies in the fact that the "... PMPRB does not include ... excessively priced [patented] drugs in its familiar comparisons of annual price increases to the Consumer Price Index [CPI] ... and, therefore, these comparisons do not fully reflect reality" (CDMA Minutes Bill C-91 7A:128-9). In other words, if the price of a patented medicine appears to be excessive or is deemed to be excessive by the Board in its price review procedure, that price is excluded from the calculations comparing patented pharmaceutical prices with the CPI. Any calculation aimed at following average annual price increases but excluding the price increases which are "excessive" is not likely to portray the true price situation. As a result, the declarations from the PMPRB that price increases are below the CPI are quite misleading.

Another aspect of the Board's operation which can work to further the capital accumulation potential of patent-holding firms relates to the fact that patentees can evade the authority of the Board by designating their patents to the public domain. The Board's jurisdiction extends only to patented medicines, and does not include off-patent medicines nor compulsorily licensed products (C&CA 1990 4,6). Consequently, "excessive" prices for drugs outside the Board's purview cannot be addressed. The annual reports of the PMPRB state that "[in] the event that a Canadian patentee should dedicate a drug product to the public domain, the relevant drug product ceases to be subject to price review by the Patented Medicines Prices Review



Board" (ibid. 6). Prior to Bill C-91, this meant that a pharmaceutical company could avoid an order to reduce the price of a drug product by designating the product to the public domain. However, because it takes at least four to five years, even for generic products, to develop and have approved a product for sale on the Canadian drug market (Eastman Commission 1985a 376), the name-brand product was still free from generic competition for several years, and the company had a free hand as to the price of the product during this period.

Under Bill C-91, the situation has been partially remedied because the Board now has retroactive authority for up to three years after a patent expires or is designated to the public domain and can, therefore, order the company in question to pay excess revenues (Statutes - Patent Act Sect. 83(7)). Furthermore, this change has not had any effect on the ability of the company to charge for a product any price desired from the moment the product is designated.<sup>48</sup> Interestingly, though Bill C-91, passed in February 1993, retroactively invalidated compulsory licenses obtained on or after 20 December 1991, the three year retroactive authority of the PMPRB to order a former drug patentee to pay back profits earned as

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<sup>48</sup> Two examples of patentees designating a product to the public domain in order to escape the Board's authority is Genetech Canada and its product Activase (PMPRB "Communique" 3 Jun/93) and Rhone-Poulenc Rorer and its product Imovane (PMPRB Bulletin Jul/93). The combined total which was paid by these companies alone to the Government of Canada as a result of their agreements with the PMPRB was \$3.415 million.

result of excessively priced products will not be fully effective until 20 December 1994 (Bonnef Senate Debates 27 Jan/93 2656).

A further point worth mentioning concerns the fact that all monies paid by drug companies as reparation for excessive prices charged for patented pharmaceuticals are paid to the federal government (Statutes - Bill C-91 Sect. 84.(3)). Senator Kirby explained that the federal government keeps these monies even though it is the provinces and consumers pay the excessive prices:

The government also admits, by the way, that even if the PMPRB is successful in lowering price the price [of an excessively priced drug], the money will never get back into the pockets of the people who overpaid. If any penalty is paid, the penalty will be paid back into the coffers of the federal government .... It's almost in the government's interest to have medicines priced artificially high at the beginning because then, if there is a rollback and a penalty paid, they get the money back into the Consolidated Revenue Fund, whereas all the costs have been paid by the provincial governments and by consumers and private insurers (Senate Debates 26 Jan/93 2631).

This is an interesting point, especially considering the fact that the federal government, unlike the situation with Bill C-22, explicitly refused to make any payment by way of compensation to the provinces for the increased drug costs. The justification for this decision was that the provinces had actually benefitted from Bill C-22 (ibid. 2632). In other words, the provinces did not actually need the \$100 million allocated for them under Bill C-22 and, likewise,

would not need such compensation with Bill C-91. Of course, that is not what the provinces said.<sup>40</sup>

Clearly, there was, and is, great potential for capital accumulation through excessive pricing of pharmaceuticals, and the jurisdiction of the PMPRB was not adequate to prevent companies from exploiting this potential. Moreover, the figures produced by the PMPRB on the increase of drug prices and used by the Mulroney

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<sup>40</sup> In March, the British Columbia Ministry of Health and Social Services announced changes to the provinces pharmacare plan made in an attempt to cap ballooning pharmacare expenditures. The changes included: mandatory substitution of generic versions of prescribed drugs where a generic was available; increasing the pharmacare deductible from \$500 to \$600; for individuals claiming more than \$600 worth of drug costs in a year, lowering the percentage of drug expenses reimbursed to the claimant from 80 per cent to 70 per cent; increasing the number of drug products on the negative formulary (ie., pharmacare will not reimburse the claimant for these products); and increasing the portion of the drug dispensing fee which seniors are expected to pay (B.C. Ministry of Health Pharmacare pamphlet March/94).

In its submission to the B.C. Royal Commission on Health Care and costs, PMAC explained its position with respect to such cost containment measures:

Pharmaceutical innovation does not happen in a vacuum .... Because government policy impacts directly on pharmaceutical innovation, the marketplace brought about by the policies of government must recognize the realities for a competitive pharmaceutical industry. Provincial "cost-containment" policies such as restrictive formularies, designation of "interchangeable" products for reimbursement based on the mandated lowest-cost product substitution, standing offer contracts, best available price, and guidelines and policies to influence the prescribing and selection of drug therapies by physicians impact adversely on a competitive pharmaceutical industry (PMAC BC Health Commission Submission Dec/90 16).

Conservative government were misleading because they did not include those prices which appeared "excessive", and therefore, statements as to the success of the PMPRB in controlling patented drug prices were also misleading. The PMPRB appears to have been an attempt at maintaining the government's legitimacy by implementing a policy which appears to be intended to protect the interests of the public, but in fact does little in that regard.

#### E) Increasing Pressure to Compete for Monopoly Capital

Socialist political economy models posit that as a consequence of a state's increasing dependence on international capital for the continued economic prosperity of the society in question, the state is forced to compete with other national, or sub-national, entities. The competition is to determine which state can provide the best business climate to attract foreign investment to the area or region instead of another area or region. This competition, also known as 'whipsawing', between governments, which set the policies that establish the business climate, is occurring everywhere including the United States. Jim Benn, discussing the tremendous impact of technology on business activities in the U.S., explains:

At the centre of this economic chaos was a frenzy of blackmail leveraging by corporations anxious to exploit local and state governments' need for investment. Plants moved across county lines to take advantage of tax break packages, runaway from union contracts, and dramatically cut wages ... collapsed economic bases created the perfect conditions for whipsawing -- potential investors pitted one community against another for the biggest tax break (1992 42).

The situation in the U.S. is different, however, in that the many American multinationals operating around the world and locating in countries that provide the best capital accumulation measures will repatriate much of the profits which will, in turn, benefit the U.S. economy. Countries like Canada are still forced to compete with other nations to provide the most attractive business climate, but receive little benefit through repatriated profits because of the relative lack of Canadian multinationals taking advantage of this trend in the global economy.

There can be little doubt that this pressure to provide the best accumulation measures was an issue in the development of Bills C-22 and C-91, though with Bill C-22 the government denied that this was the case. For example, about the seven to ten years' patent exclusivity measure provided for in Bill C-22, Harvie Andre declared:

This, by the way is still less than our trading partners. It is not satisfactory. I understand that as recently as two weeks ago the Swiss government complained that what we were proposing was still unsatisfactory in terms of international standards .... the rest of the industrialized world provides for the full 17 years from the granting of the patent or 20 years from the date the application is applied for (Minutes Bill C-22 1:12).

While this was not a direct threat of dire consequences to come if Canada did not provide the patent protection desired by the multinational pharmaceutical industry, it was a clear statement about the degree to which Canada did, or did not, compete with the rest of

the developed world.<sup>50</sup> However, overt examples of this pressure to compete are few in the case of Bill C-22 because the Conservative government went to great lengths to convince the Canadian public that this bill was a 'made in Canada' policy, not one resulting from foreign pressure, particularly U.S. pressure (Senate Debates 16 Dec/93 2491). The situation with respect to Bill C-91, however, was significantly different. With this bill, the government explicitly used the need to compete with other nations as part of the explanation for eliminating compulsory licensing and extending patent life. Conservative Senator Beaulieu explained the situation:

It is simply a fact of modern economics. By changing our licensing system, we are improving our competitive position. Today, on the basis of the period of exclusivity offered in this country to companies that invest in new drugs, Canada ranks lowest among all industrialized countries. The changes proposed in Bill C-91 will bring this period up to the minimum proposed for GATT partners. There are countries like Italy, for instance, which offer their companies exclusivity periods that go much longer up to 24 years (sic) .... They want to attract an industry that creates well-paying jobs and promotes scientific research .... We are presently the only country forcing the obtaining (sic) of compulsory licenses in the industrialized world. It is now time ... to join the rest of the world (Senate Debates 26 Jan/93 2626).

The multinational sector also emphasized the global restructuring of the pharmaceutical industry and the impact that

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<sup>50</sup> It is interesting to note that the example which Andre provides is that of the Swiss government and not the American government, especially since it was the U.S. which was applying the greatest pressure to change the legislation.

might have on Canada, particularly if the country did not keep pace with the trend:

... [PMAC] has applauded the [conservative] Government's recognition of international evidence that ... Canada must be part of the global trend to improve intellectual property protection if it is to enhance national competitiveness .... The proposed amendments will help to secure the jobs of more than 17,000 people employed by PMAC companies .... In a highly competitive, global economy, characterized by rationalization of operations, it is clear that Canada must actively compete for industry investment in high technology sectors in order to drive its economic prosperity for the future (PMAC - Minutes Bill C-91 7A:155-58 - emphasis added).

And then getting very specific, PMAC outlined the capital accumulation measures they sought:

The major factors affecting the viability of the research based pharmaceutical sector include: a supportive policy environment that is globally competitive in terms of intellectual property rights and a regulatory review process, research tax incentives, a strong and excellent research infrastructure, and a reasonable opportunity to earn a profitable return on investment (ibid. 162).

The implication of these comments is fairly clear: compete with other countries for investment or risk losing it altogether. Judging by this list, the cost to the Canadian taxpayer for providing favourable business climate desired by the pharmaceutical industry will be significant. <sup>51</sup>

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<sup>51</sup> The pharmaceutical industry is not the only industry in which multinationals are pressing the government to implement, or not to implement, particular policies. The tobacco giant Philip Morris Companies Inc. has threatened the federal government that if it proceeds with the policy proposal of legislating plain packaging for cigarettes, the company would see it as a "significant consideration in any new investment decision." As the Vancouver Sun article on the

F) Multinational Parent States Augment the Pressure to Compete

Though the GATT is the primary reason given by the government for Bill C-91, it must also be pointed out that the provisions of the bill go much further than the draft GATT agreement required. The provision which made Bill C-91 retroactive to 20 December 1991 was explained by the Conservative government as being the result of the draft GATT agreement -- the Dunkel agreement, named after the chairman of the GATT (Kirby - Senate Debates 15 Dec/92 2463) -- which was signed on this date (ibid.). As Liberal Senator Kirby explained, this was not a requirement of the draft agreement:

One begins to wonder if the Canadian government truly understands that the GATT agreement has yet to be signed and it clearly has not yet gone into effect. Even if it did ... even if you take a best case scenario from the government's point of view and assume that the GATT agreement as now drafted was signed tomorrow, Bill C-91 still does not need to be retroactive.

Article 65(1) in the text of the agreement states as follows: "No party shall be obliged to apply provisions of this agreement before the expiry of a general period of one year following the date of entry into force of this agreement."

... even if the GATT agreement is signed tomorrow, the provisions of Bill C-91 will not legally have to come into force until December 16, 1993: not retroactive, as this government has done back to December 20, 1991 (ibid. - emphasis added).

Furthermore, as Liberal Member of Parliament Lloyd Axworthy disclosed, Article 31(b) of the GATT expressly permits exemptions or waivers from harmonizing our intellectual property provisions for

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subject notes, Philip Morris also owns Kraft General Foods with 11 plants and 4,700 employees (Vancouver Sun 16 May/94 A5).



purposes of "public, non-commercial use." Axworthy posited that Canada's compulsory licensing system would correspond with this definition (Grafstein Senate Debates 15 Dec/92). Because the original reason for establishing the system in 1923 and then expanding it in 1969 was to reduce the cost of pharmaceuticals in Canada, Axworthy's position may have been valid. Axworthy also noted that Article 8 of the GATT provides signatories to the agreement the right to protect the health and social welfare systems (ibid).<sup>52</sup>

Another reason which the Conservative government used to explain the provisions of Bill C-91 was that provisions of NAFTA required the elimination of the compulsory licensing system in order to meet the NAFTA rules regarding protection of intellectual property. This explanation is true (NAFTA - Article 1709(5)); however, Mexico, also using various mechanisms to keep the cost of drugs under control (Grafstein Senate Debates 15 Dec/92) and also under pressure from the U.S. to improve its intellectual property protection, was given an eight year transition period (Annex 1001.2a(6)) before Article 1709(5) will come into force (CDMA Submission on NAFTA 15). No such transition period was provided for Canada.

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<sup>52</sup> The new GATT deal was signed in April 1994, and the provisions regarding intellectual property in it were essentially unchanged from those of the Dunkel Agreement. Though the agreement was not yet signed at the time of the article, the Economist explained that the new rules on trade-related intellectual property (TRIPs) mean all signatories now have at most ten years to implement twenty year patent life and full patent rights. As was the case in the Dunkel Agreement, there are a few limited exceptions to full patent rights available for such situations as maintaining health and social programs and the like (22 Jan/94 73).

In fact, it is the NAFTA which forced the Conservative government to make Bill C-91 retroactive to the date of the signing of the Dunkel agreement. Article 1720(6) provides:

No party shall be required to apply Article 1709(10), or the requirement in Article 1709(7) that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the text of the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [Dunkel Agreement] became known (NAFTA - as quoted in CDMA Submission on NAFTA 14).

The only "field of technology" which the Patent Act of Canada "discriminated" against was pharmaceuticals; the only provisions in the Patent Act of Canada which allowed the government to authorize the use of a patent without the "authorization of the right holder" were the compulsory licensing provisions. It appears that this provision, though seemingly general in its coverage, was specifically intended to force the elimination of Canada's compulsory licensing system, especially as Mexico was granted the eight year transition period. What this article means is that any compulsory licenses applied for or granted after the release of the Dunkel agreement on 20 December 1991, would not be valid because this article invalidates anything granted after that date (ibid.).

Given the specificity of this article, it is reasonable to assume that the pharmaceutical industry had the support and influence of the U.S. government in the bid to eliminate compulsory licensing in Canada. In a description of the pharmaceutical industry, Standard and Poor's says:

U.S. pharmaceutical companies are the world's leaders in the discovery and development of new medicines. Although there are hundreds of companies operating in this industry, it is still fairly concentrated, with four key players -- Merck, Bristol-Myers-Squibb, American Home Products, and Eli Lilly (all American) [represent] over one-third of industry volume (Oct/92 H19).

With 29, or nearly 50 per cent, of PMAC members being American-owned multinationals (PMAC Mar/94), the U.S. stood to gain from the increased profits that would accrue to the American pharmaceutical corporations with the elimination of compulsory licensing.<sup>53</sup>

In other words, the Dunkel agreement not only allowed a one-year period before its provisions had to be adopted, but also provided a state with the opportunity to obtain exemptions if the arrangement at issue was used for "public non commercial" purposes, and entitled the state to defend its health and social welfare system, all of which could have been used to defend Canada's compulsory licensing system; however, in one article the NAFTA eliminated all those avenues and forced the Canadian government to pass legislation which retroactively disposed of a system which

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<sup>53</sup> About the new GATT agreement and its intellectual property provisions, the Economist notes:

The big multinational drug firms were a driving force behind the TRIPs deal, which also encompasses trademarks and computer software .... The drug firms also promise that good intellectual-property (sic) protection will encourage investment in developing countries .... an estimated \$5 billion a year is expected to flow to American pharmaceutical companies alone. New investment is unlikely to be worth that much ... (22 Jan/94 73).

impeded the monopoly control of the Canadian pharmaceuticals market by the multinational sector. Moreover, even if the NAFTA was abrogated, Canada would be unable to re-establish a compulsory licensing system because, while it allows exemptions for existing arrangements, the GATT will not permit the re-creation of a system.

As Liberal Senator Jeremiah Grafstein explained:

Some international trade experts ... have concluded that since our compulsory drug licensing legislation pre-dated GATT and therefore was grandfathered[,] by amending our compulsory process, we will not be able to go back to the happier days of protection. We have lost our grandfather rights (Senate Debates 15 Dec/92 2469).

Regardless of which political party achieves control of government, there is virtually nothing which can be done to resurrect Canada's compulsory licensing system for pharmaceuticals.

#### G) Back to the Legitimation Function

The question has to be asked: What about the legitimation function which the socialist theory of business-government relations ascribes as the second responsibility of the capitalist state? As already noted, the PMPRB to some extent was an effort at fulfilling this role, but it takes little effort to reveal that it was, in many ways, a policy which enhanced capital accumulation, though disguised as a legitimation measure. But apart from the PMPRB and numerous efforts on the part of the Conservatives to legitimate their position by trying to convince the Canadian public that many benefits would flow from the passage of first, Bill C-22 and then again, from Bill C-91, there are not many visible signs of the Mulroney government

trying to "maintain or create the conditions for social harmony" (O'Connor 1973 6). In fact, because the legislation was going to impact on the provinces' ability to provide pharmacare benefits, adding extra expense to Canada's already overburdened healthcare system, the Conservatives could be described as eroding the conditions for social harmony.<sup>54</sup> Robert Mullaly argues that with free trade this apparent erosion of the social welfare system is not likely to stop any time soon:

With Canada-U.S free trade, the corporate sector will argue that more tax expenditures are necessary if it is to be competitive in the North American market, and increased fiscal welfare [that is, capital accumulation measures] will increase pressure to reduce welfare spending on the working class (1994 81).<sup>55</sup>

If what are traditionally thought of as "legitimation measures" are being eroded, what then, is maintaining society, especially given that the successful execution of the legitimation function, according to O'Connor's socialist theory on the functions of the capitalist

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<sup>54</sup> The Mulroney Conservatives also had to use the coercive power of government and force both Bills C-22 and C-91 through Parliament, limiting debate and invoking closure at virtually every step of the legislative process. It is not a point which enhances the image of a government seeking to ensure social harmony in Canadian society.

<sup>55</sup> Mullaly uses Richard Titmuss's typology of three welfare systems. The first is 'fiscal welfare' which benefits the capitalist class and the wealthy "mainly through the Income Tax Act" (Mullaly 1994 80). The second is "occupational welfare" which benefits labour, particularly the higher earning labourers, through such measures as employee benefits. The third is "general welfare" which benefits the "un or under-employed" through such measures as "modest universal transfers, means-tested programs, and minimal social insurance plans oriented mainly to low-income people and other vulnerable groups" (ibid. 80-82).

state, is necessary for profitable capital accumulation. Perhaps the answer, or part of it, lies in the current globalization trend. As multinational corporations outgrow their national boundaries and are able press governments to compete with each other to provide the most favourable business climate, profitable capital accumulation for these corporation becomes less dependent on any one country's success, or lack thereof, in fulfilling the legitimation function. The result is that countries -- like Canada -- with economies which are highly dependent on foreign investment must compete with other states to provide for MNCs the best capital accumulation provisions or risk losing the investment altogether to another nation whose state is willing to provide such measures. The legitimation function in countries of this type may eventually become the capacity to keep the majority of the population working.

CHAPTER FIVERATIONAL SELF INTEREST OR CAPITAL ACCUMULATION?

This has been a case study of the Canadian pharmaceutical industry which has focused on both the development of two pieces of legislation passed by the Mulroney Conservatives, who formed the federal government in the years 1984 to 1993, and on the role of the multinational pharmaceutical companies in the development of these bills. Together these two Bills -- C-22 passed in November 1987, and C-91 passed in February 1993 -- restricted and then eliminated the system of compulsory licensing which since 1969 had provided patented pharmaceutical products to Canadian consumers at a reasonable cost by increasing the competition to which these products were subject. These bills were passed despite widespread opposition to them and the detrimental impact the legislation would likely have on the indigenous generic sector of the pharmaceutical industry, which had sprung up as a consequence of the 1969 expansion of the compulsory licensing system. An understanding of why the Mulroney government would favour multinational business interests, none of which were Canadian-based, over indigenous business interests was sought through an examination of business-government relations.

An analytical framework based on each of two bodies of theory -- public choice and socialist political economy -- was chosen as a 'filter' through which the details of this case study were considered. From the rational, self-interest oriented public choice theory was chosen a framework provided by W.T. Stanbury that

emphasizes the 'resources' available to corporate interests wanting to persuade government that their policy preferences should be implemented over those of other interests. Using this framework, the respective resources of the two trade associations representing the two sectors of the pharmaceutical industry were compared and contrasted in the context of the goals of the Conservative federal government. Through this comparison, an attempt was made to determine which of the two trade associations had the better reserve of resources with which to make its case to government and which could be offered as a benefit to the government in return for the preferred policy on the compulsory licensing issue.

James O'Connor's theory of the functions of the capitalist state is the analytical framework for business-government relations chosen to represent socialist political economy. O'Connor, and those who have built on his model, emphasizes both the responsibility of the capitalist state in ensuring that the conditions for capital accumulation exist as well as the state's increasing reliance on 'monopoly capital' as the means of providing economic prosperity to the society. As the state becomes more reliant on monopoly capital, the state simultaneously becomes more vulnerable to demands from monopoly capital to further enhance the potential for capital accumulation. The details of this case study of the Canadian pharmaceutical industry were framed along the lines suggested by the O'Connor model and the details of the events examined to determine, whether there was support for this portrayal of events.



With respect to the findings of the public choice analysis, it was clear that PMAC, as representative of multinational sector interests, had an advantage compared to the CDMA, representative of generic sector interests, in terms of the three types of resources from which it could draw. Regarding the economic resources to which the two trade associations had access, whether considered in terms of advertising purchased, political donations made, or lobby firms hired, there was no doubt that PMAC's economic resources were superior to those available to the CDMA. PMAC's advertising campaign was considerably more sophisticated than that of the CDMA, and the trade association's political contributions to both of the main political parties, but particularly to the Progressive Conservatives, were generally much larger than any of the CDMA contributions to either party. That PMAC was able to hire the services of several lobby firms during the Bill C-91 debate to the point of "almost flatten[ing] the opposition" (Cameron 21 Sept/92) also indicates the economic resources available to PMAC, as well as the trade association's willingness to use them.

The examination of 'bargaining' resources available to each of the two associations also showed PMAC to have the advantage. Besides the substantial investments which PMAC could promise to make, this association could use groups dependent on PMAC member activities as leverage in its bid to have compulsory licensing eliminated. The threat of job losses or decreased investment in R&D, particularly given the concentration of the multinational sector's employment and R&D in Quebec appears to have been a potent resource available to

PMAC. The potential impact of the CDMA's employment numbers and R&D figures should the elimination of compulsory licensing result in generic sector employment losses and R&D cuts was minimal compared to those of PMAC.

With respect to 'positive' resources, though less clear with Bill C-22, PMAC certainly appeared to possess a 'backlog of political success' with Bill C-91. The success of Bill C-22, seemed to embolden PMAC officials to continue their pursuit of full patent protection of pharmaceuticals; this was not a resource available to CDMA. In terms of the access available to officials of the two groups, PMAC also had an advantage over the CDMA. Not only did PMAC purchase access, or at least avenues of potential access, through the lobby firms the association hired and even through its generous political contributions, but with Judy Erola, a former Minister of Consumer and Corporate Affairs, who possessed knowledge and understanding of the federal governmental and bureaucratic structure, the multinational sector trade association had a president who could act as its chief lobbyist. That PMAC appears to have taken advantage of its access resources as early as 1989, three years before Bill C-91 moved through Parliament, is evident from the statement Judy Erola made to the legislative committee hearings.

The CDMA in hiring lobby firms also had potential avenues of access to government, and whether as a result of the lobby firms or some other reason, the detailed listing of instances when CDMA officials and government officials did have or may have had contact suggests that CDMA was granted some access government officials.

However, that access appears to have been limited to bureaucrats rather than cabinet ministers and, more particularly, the Prime Minister.

The role of the provincial governments in opposing the legislation was also considered in this analysis. Much of the CDMA lobbying effort focused on the provincial governments, likely in the hopes of having them augment their lobbying of the federal government. However, because of the constitutional division of powers, even the opposition of nine of the ten provinces, as was the case with Bill C-91, was unable to stop the Mulroney Conservative government passing the legislation eliminating compulsory licensing. This was despite the fact that Bills C-22 and C-91, though dealing with the exclusively federal jurisdiction of patent policy, would have significant repercussions on the provincial jurisdiction of healthcare. While financial responsibility for healthcare was initially shared equally between the two levels of government, the federal government over the last two decades has passed several bills which reduce its share of funding for healthcare with the responsibility for making up the difference falling to the provinces. Weller and Manga suggest that by the end of the century, federal transfers for healthcare will have dwindled to negligible amounts (1993 7). In other words, it will be the provincial governments, not the federal government, that will be responsible for much of the increasing cost of pharmaceuticals resulting from the elimination of compulsory licensing.

In many ways, the provinces were like the numerous consumer groups which opposed the compulsory licensing legislation; they lacked the status which government, in the public choice depiction of business-government relations, accords producer groups. This is a result of the fact that individual producer groups, in most instances, can have a much greater impact on the economy than can individual consumer groups.

Therefore, in terms of the various resources suggested by Stanbury and examined here, the multinational sector trade association had a better resource reserve than did CDMA and, consequently, would seem the most likely candidate to come to some arrangement with government with respect to the compulsory licensing issue. But as noted at the end of the analysis section, PMAC also had the support of the U.S. government in this issue. Moreover, evidence was provided which showed that not only were the elimination of compulsory licensing and the FTA linked, but, as was shown in the socialist political economy section, so too were Canada's compulsory licensing system and the NAFTA.

This linkage with the two free trade agreements involving Canada and the U.S. raises the question as to whether the wealth of resources which PMAC possessed did in fact play a key role in the Mulroney government's decision to eliminate compulsory licensing. It could be the involvement of the U.S. government which was the crucial element. This is a weakness of Stanbury's framework in that its focus is too narrow. The fact that this was the era of 'global restructuring' and falling trade barriers is considered in the

context of giving PMAC leverage in making its demands of the Canadian government, but not in the context of its impact on political events generally and how those events, in turn, might have affected the outcome of the compulsory licensing issue.

Stanbury's analytical framework has been most helpful in providing a detailed examination of the CDMA and PMAC and the issues immediately related to the compulsory licensing issue, such as why drug costs and their control were not a priority issue for the Mulroney government. But this framework tends to depict the two trade associations as the major players in the compulsory licensing issue and the Canadian government as bargaining with the PMAC and CDMA to determine the fate of compulsory licensing. It appears, however, that events, such as the free trade negotiations and the international move towards more 'open' economies, which were going on simultaneous to the events of compulsory licensing issue could, in fact, have been propelling the development of events in the pharmaceutical industry.

While Stanbury's public choice model tends to focus on the attributes of business interests, O'Connor's socialist model focuses more on the government side of business-government relations. This focus stems from the assertion in this model that the state's primary function is to ensure the conditions for capital accumulation. Contrary to the portrait of business-government relations provided by the public choice analysis, the government in O'Connor's model loses its capacity to choose between competing factions of capital, as it becomes increasingly reliant on monopoly capital to provide economic

prosperity to society. More dependent on the activities of monopoly capital, the government is more vulnerable to its demands or its displeasure if those demands are not met.

This case study showed that the restriction and then elimination of the compulsory licensing system for pharmaceuticals was a policy which not only enhanced the capital accumulation potential of pharmaceutical companies, but enhanced that potential for the multinational sector to the detriment of the indigenous generic sector and Canadian consumers. It also looked at how the government attempted to convince Canadians that the provisions eventually leading to the elimination of compulsory licensing were not going to be a hardship for the generic companies. But the fact was that not only were generic companies prohibited from manufacturing generic versions of patented products for the Canadian market, but they were also prohibited from manufacturing them for other markets if the patent on the products concerned had not yet expired in Canada. Even for the purpose of regulatory approval, production of generic products in anticipation of a patent expiring could be delayed by the patentee simply by alleging patent infringement.

This examination showed that the creation of the Patented Medicines Prices Review Board, ostensibly designed to ensure that patented drug prices were not excessive, was not provided with sufficient powers to fulfill its mandate. Even with the high rates of non-compliance with the Board's pricing guidelines, not once did the Board use the authority it did possess to revoke patent

protection on the overpriced products. Moreover, with its jurisdiction limited to patented pharmaceuticals only, it did not possess the authority to act in many situations which arose because of the changes in pharmaceuticals market which Bills C-22 and C-91 introduced. An example of such a situation was the ability of multinational drug companies by designating patents to the public domain to charge excessive prices on the products without any limitation or competition for several years because of the length of the approval process for new drug products including generic products. In addition, because the Board did not include the prices of those products which appeared to be excessively priced in its calculation of the average price increase of patented pharmaceuticals, the Board was able to assert that average increases of patented pharmaceutical prices were consistently below the Consumer Price Index, though the assertion was very misleading to the public.

The efforts of foreign governments to augment the pressure of their multinational companies is another aspect of this theory of business-government relations to which the details of this case study conform. The linkages between the compulsory licensing issue and the two free trade agreements provide a clear indication of the extent to which the U.S. government supported the efforts of multinational pharmaceutical companies. As was the case in the public choice analysis, the concentration of the pharmaceutical industry in a politically sensitive region provided the multinationals with added leverage as their leaders pressed the Conservative government to

compete with the rest of the world by providing the demands of the multinational sector or risk losing the pharmaceutical investment altogether.

While the chief criticism of Stanbury's public choice framework resulting from this pharmaceutical industry case study was that the model tended to 'paint with too narrow a brush' in that it did not allow for the environment in which business-government exchanges were occurring, the primary criticism of O'Connor's socialist model is that it tends to 'paint with too broad a brush.' The various government departments are assumed to be acting essentially in concert to protect the interests of capital and assure its profitable accumulation. The details of the pharmaceutical case study fit the parameters of this model very well, but the role of individuals is virtually absent. For example, Edward Pratt, who was appointed by U.S. President Reagan as chairman of the private sector team advising American negotiators in the FTA negotiations and who is credited as being a significant player in bringing the issue of patent protection for pharmaceuticals to the fore (McQuaig 1991 155-58), may have been crucial to the fate of compulsory licensing in Canada. This model has a very much 'pre-destined' aura to it, which may well be the case, but individuals and groups of individuals do play a role in the process. If another person, other than Brian Mulroney, had been leader of the Progressive Conservative party and Prime Minister over this nine year period, the events may have played quite differently.

A further point, which becomes evident in a comparison of the two analyses, is that the motivation of 'rational self-interest' is



too simplistic to provide a detailed understanding of the decisions taken by the Mulroney government. It is hard to imagine a 'rational and self-interested' politician choosing to enact a measure as punitive as the prohibition on the manufacture and export of generic products still under patent in Canada. For a government which emphasized exports as the means to economic prosperity for the country, this seems to be an 'irrational' policy. So too with the decision which, by allowing multinationals simply to allege patent infringement, may mean the delayed entry of generic products onto the market once the patent for the product has expired and, therefore, higher costs to the Canadian consumer. These measures appear to benefit no one but the multinational pharmaceutical companies. Why would any 'rational' politician, presumably seeking re-election, enact such policies unless he/she was subject to some form of coercion? Responding to coercion could still be described as acting in one's self-interest, but the motivation of 'rational self-interest' does not capture the depth or richness of 'coercion' as a motivating factor.

A potential alternative to coercion as a motivating factor which, again, could fall under the general rubric of 'rational self-interest' might be the influence of ideology. As noted earlier, the Mulroney Conservatives adhered to an essentially neo-conservative agenda during their years in office. Consequently, this government was interested in cutting back the activities of government, particularly with regard to government spending on social welfare including healthcare, with aim of restoring the primacy of the market

in allocating society's resources. While garnering votes from the Canadian public would, of course, have been important to Progressive Conservative politicians as much as any other politician, seeking to entrench a policy framework in Canada which conformed to neo-conservative principles may have been equally important.

Though neo-conservatism advocates reduced government spending on social programs, those same programs have generally been very popular with the Canadian public. This popularity would have made it difficult for the Mulroney government to scale back significantly or eliminate such programs; consequently, indirect action would have had to have been taken by the Mulroney government to make significant changes to social programs in Canada.<sup>1</sup> Implementing a policy which significantly burdens an already overburdened healthcare system by increasing pharmaceutical costs through elimination of compulsory licensing might have been a 'back door' means of trying to scale back public health insurance in Canada, and the FTA, the NAFTA, and the GATT, all act to make it essentially impossible to reverse the compulsory licensing policy implemented by the Mulroney government. Given the Mulroney government's policy agenda, elimination of compulsory licensing, the solution to a system perceived as a policy problem by PMAC, may have appeared also to be

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<sup>1</sup> A well-known example of this 'back door' approach to implementing the Conservatives' policy agenda was the attempt at de-indexing the old age pension in 1985 which failed because of the vociferous opposition the proposal generated. The Mulroney government achieved a similar end by changing the Income Tax Act to 'claw back' the old age pension from those seniors earning more than a certain amount each year.

policy solution to a government trying to find indirect means of getting government out of the realm of social program maintenance.<sup>2</sup>

Interestingly, while ideology may have played a role in the passage of Bills C-22 and C-91, these two bills created a whole new regulatory regime in the form of the PMPRB, which, as I noted, while not particularly effective, but would certainly be costly. Given that de-regulation is also a principle of neo-conservatism, the creation of the Board seems somewhat contradictory.<sup>3</sup> Moreover, the elimination of compulsory licensing actually resulted in the elimination of a well-functioning market. Given that one of the generally accepted principles of neo-conservatism is to restore the primacy of market forces, this policy decision again seems at odds with the ideology. Ideology as a motivating factor also does not provide any clues as to why the federal government would adopt measures prohibiting the manufacture and export of generic products the patents to which have not yet expired in Canada. This particular measure had no relationship to the Canadian public health insurance system and, thus, would not further any effort which the Mulroney Conservatives may have been undertaking to curb the role of Canadian governments in social programs. In sum, the influence of ideology as a motivating factor in the federal government's decision to pass Bills C-22 and C-91 is an alternative to coercion, but like the

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<sup>2</sup> See, for example, John Kingdon Agendas, Alternatives, and Public Policy., 1984 for further explanation of policy problems and solutions.

<sup>3</sup> See Chapter Four, Footnote 2 for a brief explanation of the basic principles of neo-conservatism.

earlier example, 'rational self-interest' does little to capture the meaning of the concept of 'ideology', and Stanbury's analytical framework provides little opportunity to draw out this concept from the details of the case study as a potential motivating factor.

In general, O'Connor's socialist model, which permits a consideration of the context in which the compulsory licensing issue took shape and the depth of the motivating factors for the decisions taken, is more successful than is the public choice framework provided by Stanbury in providing a broader explanation of the compulsory licensing issue. However, in terms of their focus, these analytical constructs are in many ways complementary. For example, within the constraints suggested by O'Connor's framework of analysis, political decision makers may choose from the policy options available according to 'rational self-interest', whatever that may be for the individual(s) making the decision. Used together, a much more detailed and holistic understanding can be developed of why the federal government under Brian Mulroney chose to eliminate the compulsory licensing system for pharmaceuticals.

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